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OVERSIGHT OF THE DEPARTMENT OF JUSTICE

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THURSDAY, JULY 25, 2002

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 10:03 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kennedy, Kohl, Feingold, Schumer, Durbin, Cantwell, Edwards, Hatch, Grassley, Specter, Kyl, Sessions, and Brownback.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Senator Hatch is on his way, and I know we have votes scheduled on the floor. I will begin. Senator Hatch and I will give opening statements and we will keep those brief and we will then go to a brief statement from the Attorney General. Then we will have rounds of questions at 10 minutes each, using the early bird rule, after Senator Hatch and myself. Of course, the first two members here were Senator Grassley and Senator Durbin.

Attorney General, we welcome you to the committee. It is the first time this year; actually, the first time in more than 8 months. I would hope that we might go to a more frequent schedule because oversight hearings give us and the American people the opportunity to hear directly from you about the performance of the Department of Justice. Oversight is what makes things work better.

Today, oversight is even more important than ever, not only as a check, but to check whether the actions being taken by the Federal law enforcement agencies under your direction are necessary, are warranted, and are going to deal most effectively with the domestic front of the ongoing war on terrorism.

Last fall when we worked together to enact the counter-terrorism bill, I said that with all its new authorizations for Government power, oversight of how the law is being used will be crucially important. This committee has worked hard to follow through on that belief and that pledge.

As you recall, the Republican Leader in the House of Representatives wanted to make sure that on some major parts of the legislation we had sunset provisions. I agree with him, but that requires us to do constant oversight to determine whether those sunset provisions will automatically take place or whether the laws will be extended.

I know that when you were a member of this committee, you too appreciated the crucial role of congressional oversight. I recall you saying at a hearing in 1999, and I think I am quoting you correctly, "I do think that oversight is one of the most important functions that we have as a Congress in our constitutional system, and I am glad to serve on a committee that takes the responsibility seriously." You were right. I want Attorney General Ashcroft and Senator Ashcroft to feel the same way about this. The committee does take its responsibility seriously. We need your cooperation in your current role to perform it.

We worked together in this effort to defend the public safety and national security most significantly in the crafting of the USA PATRIOT Act last year, after the horrendous and tragic September 11 terrorist attacks. The Congress is continuing to work closely with the White House in crafting a new Homeland Security Department. The product for the American people is a better one when the branches of our Government work constructively together for the good of the Nation.

The hard-working men and women who have spent careers at the Department of Justice working for the public good have done some excellent work. They have endured many long and stressful hours, and they have achieved some great successes. I know you are as proud of them as we are on this committee, but in evaluating the Justice Department's performance as an organization, we have some concrete facts that cannot be ignored and they can't be rhetorically minimized.

The fact is that in 2001, the first year of your tenure, the Nation's crime rate for murder, rape, robbery, aggravated assault, burglary, and theft reversed a downward trend and it rose by 2 percent over the 2000 rate. The murder rate climbed more, up by 3.1 percent. Our new crime rate reverses 9 years of declining crime rates, and that should concern us all because crime is not a partisan issue. All of us are against crime.

This reversal in the crime rate might suggest that it could come about because the Justice Department is focusing primarily on preventing terrorist attacks in the post-9/11 era. But the second fact, demonstrated when Department records were obtained under the Freedom of Information Act, shows that counter-terrorism efforts are not a valid excuse for rising crime.

FBI referrals for prosecutions of bank fraud, bank robbery, and narcotics cases remained virtually unchanged after 9/11. Even after 9/11, prosecutors in your Department declined 61 percent of international and domestic terrorism cases referred to them by the FBI in the 6 months from October 2001 to March 2002. They declined 61 percent of them.

The third fact is that before September 11, the Department's counter-terrorism efforts were facing problems, and our bipartisan oversight efforts demonstrate that. Part of them were a management issue. When FBI supervisors are banned from appearing before the special FISA court tasked with issuing the most sensitive national security-related order, banned even though the law allowed them to be there, when the Justice Department and the FBI scramble to come up with new procedures to ensure accuracy in presentations to that court, when information technology is so out-

dated that critical information such as the Phoenix memorandum and other intelligence information is not put together to bolster the application for a court order in the Moussaoui case, then we have serious management problems. What I am concerned about is those management problems in the Department of Justice are still there.

These counter-terrorism problems were also in part a resource issue. Between 1992 and 2000, the number of FBI intelligence officers steadily increased by 357 percent, but in 2001 the number started declining, with a 5-percent decrease in that year alone.

The fourth fact that we have looked at in our committee is that FBI requests for certain increases in its counter-terrorism budget for fiscal year 2003 were rejected. They weren't rejected by this committee or by the Congress. They weren't rejected by the White House Office of Management and Budget. They were rejected by your Department of Justice.

Press accounts earlier this summer reported that you had turned down a $58 million FBI request for counter-terrorism resources in the current year's budget. Actually, the Attorney General's 31-page request to OMB on September 10, 2001, regarding the Department's fiscal year 2003 budget made virtually no reference to counter-terrorism, except in one area, and that was eliminating $65 million for counter-terrorism equipment grants.

The request did not recommend the budget enhancements requested by the FBI for foreign language services, counter-terrorism field investigations, and intelligence production, (field and headquarters research specialists), which totaled $57 million. A day later, after 9/11, the Congress and the White House worked together to supplement the counter-terrorism budget for fiscal year 2002 with an additional $745 million, but I think opportunities were clearly missed.

The last time you appeared here, you brought an Al Qaeda operations manual to make the point that the war on terrorism is serious and that you take it seriously. I want to make it clear that everybody—the Attorney General, this chairman, the Ranking Member, and every member of this committee—is very much against terrorism. There is no more serious business that we deal with day in and day out.

You have taken an oath to support the Constitution, as have I; we all have. Al-Qaeda may have an operations manual that serves them in the short term. This country has an operations manual; we have an operations manual called the United States Constitution. It has served us for 225 years. It has served us in good times and bad times. It has served us during civil wars and world wars, and the only times we have been less than defended is when we have ignored the protections of that Constitution.

We can fight terrorists. We will fight terrorists. All of us will join together. All of us were hurt badly last year. But we will do it and we will also protect, as we are all sworn to, our Constitution.

We have a lot to do on behalf of the American people, and it is a great privilege to serve and represent the American people. You, Mr. Attorney General, are privileged to serve in one of the most important posts in Government. I know you personally and I know that you appreciate that privilege and I know you feel honored by

it, as you should. And we are all privileged on this side to serve as Senators.

But someday we will all be gone and you will be gone. There will be a different Attorney General, a different administration, a different chairman, and different members of this committee. But we want to make sure that what we do here leaves a stronger and a better country, a country not only protected by our institutions, yours and ours, but by our Constitution.

Senator Hatch?

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I am honored to serve on this committee with every member of the committee. It is a wonderful committee and there is a lot that gets done here.

I am pleased to welcome our good friend and former colleague, Attorney General Ashcroft, back to the committee. It need not be said that these are challenging times for our country. Now more than ever, we can fully appreciate the tireless and often heroic efforts of our Federal law enforcement officials, I would say generally and, of course, your efforts, General Ashcroft, specifically.

General Ashcroft, you can be sure that the American public appreciates your leadership at the Department of Justice during these trying and anxious times. I want to personally commend you, the Department of Justice, and the entire administration for your dedication and commitment to ensuring the safety of our citizens.

We have to look no further than the daily press reports to appreciate the degree to which your efforts are protecting us from terrorist threats. Hardly a day goes by that we do not hear of yet another deadly terrorist attack in the Middle East. We appreciate that you are taking every lawful measure in your power to protect our citizens from such attacks, and that is important.

While we applaud you and take great solace in the fact that there have been no new attacks in the 10-months since September 11, we all recognize that we can and must do more to prevent future attacks in our country. The administration and Congress welcomed this challenge immediately following the September 11 attacks. Once the shock, outrage, and numbness were over and wore off, we realized that we were living in an entirely new world where many aspects of our everyday lives have been changed forever.

The administration showed leadership by sending proposed antiterrorism legislation to Congress. Congress responded by putting aside partisan differences in passing the PATRIOT Act with a near unanimous vote in the Senate. This Act provided the Justice Department with much-needed tools to combat terrorism. It was a measured response that balanced the need to protect Americans with the need to protect Americans' civil liberties. And despite the dire predictions of some extremist groups, the PATRIOT Act has created no erosion of the civil liberties that we all hold dear as Americans.

Today, I believe many of us would like to hear about the coordination of the Department of Justice with the recently proposed Department of Homeland Security. After carefully considering the input of Congress, academics, and other experts, as you know, the

President proposed comprehensive legislation to create the new department.

There is little question that this proposal, which will merge components of dozens of Government agencies and departments, is an ambitious one, but one that makes sense and will realize efficiencies that should benefit the American people, and people all over the world as a matter of fact.

Government entities that are charged with protecting our country's borders and infrastructure, assessing threats, and responding to national emergencies, all must work collaboratively, effectively, and efficiently to prevail in this war on terrorism.

General Ashcroft, the committee is well aware of how essential it is to foster the effective sharing of information both within and among Government agencies. Indeed, many of us believe the ability to enhance information-sharing within Government is the most critical challenge we face, and was the focus of some of the most important changes we made when we passed the PATRIOT Act. We welcome your comments on this subject.

I will say, as I have said previously, it is a pleasure to see for the first time in a decade a close and cooperative working arrangement and relationship between the Attorney General and the Director of the FBI. It stands as a testament to your leadership at the Department of Justice. Without full cooperation and effective communication, our country's ability to respond to the challenges posed by terrorist threats would be very severely hindered.

Since September 11, we have been made aware of a number of reforms you have instituted within the Justice Department. More recently, you announced amended guidelines that will assist the FBI in conducting investigations capable of preventing terrorist attacks. In my view, these guideline changes support, and in fact are critical to, the FBI's reorganization plan.

While there appears to be bipartisan support for the revised guidelines, concerns have been voiced about their scope. It seems clear to me, however, that if we are serious about ensuring that the FBI can operate proactively and investigate future rather than merely past crimes, the FBI must have the ability to do things our Constitution permits, like search the Internet, use commercial data-mining services, and visit public places.

Just last week, you invoked authorities granted by the PATRIOT Act to secure our borders by requesting the Secretary of State to designate nine additional groups as terrorist organizations. In December of last year, the Secretary designated, at your request, 39 such groups. Groups like Al Qaeda, Hamas, Hezbollah, which enter our country to network and raise funds to finance terrorist attacks against innocent civilians here and abroad must be kept out of the United States.

You have, in short, been a very busy man, and let me tell you right now how much I appreciate your dedication and hard work to the nearly endless task that awaits you. Just last week, the Justice Department scored a major triumph in the John Walker Lindh case. This week, we learned that the Justice Department has succeeded in obtaining an indictment against five leaders of the Abu Sayyaf terrorist group that committed deadly hostage-taking acts against Americans and others in the Philippines. Zacarias

Moussaoui, the alleged 20th hijacker in the September 11 attacks, has been indicted on death penalty charges and awaits trial in the Eastern District of Virginia.

With each of these cases, this administration, acting through its Department of Justice and with the assistance of its allies overseas, sends a strong message to all who commit acts of terrorism against Americans. You will be found, you will be prosecuted, and you will be brought to justice, is what our message is.

I also want to applaud you for your aggressive response to the crimes of corporate fraud. As each corporate scandal has come to light, you and the Securities and Exchange Commission has responded swiftly and effectively. As soon as evidence of corporate wrongdoing surfaced at Enron, the Department of Justice established a special task force to investigate those matters.

Within weeks, Federal prosecutors sought and obtained a grand jury indictment charging Arthur Andersen with obstruction of justice. Just last month, a jury convicted Andersen. Without a doubt, the Department, under your leadership, has delivered a clear message to the corporate world, just as you have to the terrorist world. Abuses will not be tolerated and this Department is not a paper tiger.

Those who question the Justice Department's and the SEC's resolve should consider whether some of today's scandals could have been avoided through vigorous enforcement by previous administrations. At a time when too many Americans are questioning whether laws or ethics remain present in our board rooms, it is reassuring to know that this Justice Department will not allow corporations that have defrauded investors and employees to walk away with a mere slip on the wrist.

In closing, I would like to extend special thanks to you, General Ashcroft, for the degree to which you and Director Mueller have been responsive to the inquiries of this committee and to the Joint Intelligence Committees. I might have to leave the hearing today because of my being on the Joint Intelligence Committees and the investigation we are doing there.

This is your third appearance before this committee since September 11. Director Mueller has appeared here twice and has briefed members of this committee in separate sessions as requested. Both of you have made senior Justice Department and FBI employees available to address various issues of concern. So we sincerely appreciate the responsiveness that you both have demonstrated, particularly in this time of war.

I want to thank members of the committee for the work that they have done so far, and I want to thank you for the work that you and those at the Justice Department have done.

Thank you, Mr. Chairman.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Chairman LEAHY. There is certainly no need to ask the Attorney General to take an oath and nobody is going to request that.

Go ahead, sir.

STATEMENT OF HON. JOHN D. ASHCROFT, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Attorney General ASHCROFT. Well, good morning, Chairman Leahy and Senator Hatch and members of the Judiciary Committee. It is pleasing to have this opportunity to see you again and to be with you.

Let me assure the chairman that I do agree with him about the value of congressional oversight and my position in that respect is unchanged. I seldom quote myself, but I think the quote you chose accurately reflects my feelings today, as it did, I guess it was in 1999. Thank you very much.

Ten months ago, our Nation came under attack. It was a calculated, deliberate effort in which terrorists slammed planes into the World Trade Center, the Pentagon, and a field in Pennsylvania, killing thousands. These attacks were acts of war against our Nation and an assault on the values for which we stand, the values of equality, justice, and freedom. This unprecedented assault brought us face to face with a new enemy and demanded that we think anew and that we act anew in order to protect our citizens and our values.

Immediately following the attacks, I ordered a top-to-bottom review and reorganization of the Department of Justice. Our objective was to mobilize the resources of our law enforcement and justice system to meet a single overarching goal: to prevent future terrorist attacks on the United States and its citizens.

The review found that America's ability to detect and prevent terrorism has been undermined significantly by restrictions that limit the intelligence and law enforcement communities' access to and sharing of our most valuable resource in this new war on terrorism. That resource is information.

Many of these restrictions on information were imposed decades ago in order to address the real and perceived abuses of law enforcement and intelligence in the 1960's and the early 1970's. In the second half of the 1970's, the pendulum of reform swung beyond correcting abuses into imposing what we now recognize as excessive constraints on our intelligence-gathering and intelligence-sharing capabilities.

In the late 1970's, reforms were made that reflected a cultural myth. It was one that suggested that we could draw an artificial line at the border to differentiate between the threats that we faced. In accordance with this myth, officials charged with detecting and deterring those seeking to harm Americans were divided into separate and isolated camps. Barriers between agencies broke down cooperation. Compartmentalization hampered coordination.

Surveillance technology was allowed to atrophy, eroding our ability to adapt to new threats. Information, once the best friend of law enforcement, became an enemy. Intelligence-gathering was artificially segregated from law enforcement, effectively barring intelligence and law enforcement communities from integrating their resources.

Under the Foreign Intelligence Surveillance Act, known as FISA, a criminal investigator examining a terrorist attack could not coordinate with an intelligence officer investigating the same sus-

pected terrorists. As compartmentalization grew, coordination between law enforcement and intelligence suffered.

Reforms erected impenetrable walls between different Government agencies, prohibiting them from cooperating in the Nation's defense. The FBI and the CIA were restricted from sharing valuable information. As limitations on information-sharing tightened, cooperation decayed. FBI were forced to blind themselves to information readily available to the general public, including information available to those who seek to harm us. Agents were barred from researching public information or visiting public places, unless they were investigating a specific crime. As access to information was denied, accountability deteriorated.

As information restrictions increased, intelligence capabilities atrophied. Intelligence-gathering techniques, created in an era of rotary telephones, failed to keep pace with terrorists utilizing multiple cell phones and the Internet. As technology outpaced law enforcement, adaptability was lost.

The cultural of rigid information compartmentalization that took root in the 1970's continued, irrespective of changes in administrations, throughout the 1980's and 1990's. As late as 1995, we found that the guidelines governing FISA procedures were tightened to a degree that effectively prohibited coordination between intelligence officers and prosecutors within the Department of Justice.

Based on this review, we concluded that our law enforcement and justice institutions, and the culture that supported them, had to improve if we are to protect innocent Americans and to prevail in the war against terrorism. In the wake of September 11, America's defense requires a new culture focused on the prevention of terrorist attacks. We must create a new system capable of adaptation, secured by accountability, nurtured by cooperation, built on coordination, and rooted in our constitutional liberties.

Congress has already taken the first step, crucial steps to adapt our response to changing security requirements. The passage of the USA PATRIOT Act made significant strides toward fostering information-sharing and updating our badly outmoded information-gathering tools. The PATRIOT Act gave law enforcement agencies greater freedom to share information and to coordinate our campaign against terrorism.

Prosecutors can now share with intelligence agents information about terrorists gathered through grand jury proceedings and criminal wiretaps. The intelligence community now has greater flexibility to coordinate their anti-terrorism efforts with our law enforcement agencies.

The PATRIOT Act also modernized our surveillance tools to keep pace with technological change. We now have authority under FISA to track terrorists who routinely change locations and make use of multiple cell phones. Thanks to the new law, it is now clear that surveillance tools that were created for hard-line telephones—tools like pen registers, for example—these new tools apply to cell phones and the Internet as well.

The recently announced reorganization of the Federal Bureau of Investigation is a second way we have risen to meet the new challenges we face. Our reorganization comes in the midst of the largest criminal investigation in United States history and the expan-

sion of the FBI Joint Terrorism Task Forces to reach each of the 56 FBI field offices.

Our reorganization refocuses the FBI on a terrorism prevention mission that is different from the past. Instead of being reactive, agents will now be proactive. Instead of being bound by rigid organization charts, our work force will become flexible enough to launch new terrorism investigations to counter threats as they emerge.

Management and operational cultures will be changed to enhance this adaptability. Over 500 field agents will be shifted permanently to counter-terrorism. Subject matter experts and historical case knowledge will be centralized so they are accessible to field offices, the intelligence community, and our State and local law enforcement partners.

The Counter-Terrorism Division at FBI headquarters will be restructured and expanded significantly to support field offices and other intelligence and law enforcement organizations. Finally, we will enhance the FBI's analytical capacity and integrate our activities more closely with the CIA.

A third way in which we have acted to enhance our homeland security is by giving updated guidance to our FBI agents in the field. After a meticulous review of the previous Attorney General guidelines, which unnecessarily inhibited agents from taking advantage of new information technologies and public information sources, revised guidelines were announced in May. These new directions to FBI agents are crafted carefully to correct the deficiencies of the old guidelines, while protecting both the privacy and the civil liberties of all Americans.

Throughout this reform process, the Department of Justice has been guided by four values, the four principles that shape and inform our new anti-terrorism mission: adaptability, accountability, cooperation, coordination. By following these lodestars, we have worked with Congress and we have worked with our partners in law enforcement to correct the excesses of the past and to achieve a more stable, secure equilibrium in our justice policy.

The creation of the Department of Homeland Security will prove critical to this process of restoring balance to our security policy. President Bush has mandated that the new Department of Homeland Security be an agile organization capable of meeting, and I quote, "a new and constantly evolving threat." We have sought to achieve greater accountability for our obligation to protect the rights of all Americans.

The proposed Department of Homeland Security would ensure that homeland security activities and responsibilities are focused in a single department. For the first time, America will have under one roof the capability to identify and assess threats to our homeland, to match these threats to vulnerabilities, and to act to ensure the safety and security of the American people. All Americans will know where the buck stops and with whom.

We have sought to foster greater cooperation among all aspects of intelligence and law enforcement, be they Federal, State, or local. The proposed Department of Homeland Security would exemplify a new ethic of information-sharing in Government. FBI Director Mueller put it best, and I am quoting, "The FBI will provide

Homeland Security the access, the participation, and the intelligence necessary for this proposed department to achieve its mission of protecting the American people."

President Bush has called on the Congress and the American people to reexamine past practices to reorganize our Government in order to confront the challenge that history has placed before us. His call echoes that of another President over 100 years ago who appealed to Congress and the Nation to rise to the daunting task that lay before it.

"The dogmas of the quiet past are inadequate to the stormy present," President Abraham Lincoln told Congress in 1862, just before issuing the Emancipation Proclamation. I am quoting: "The occasion is piled high with difficulty," he said, "and we must rise with the occasion. As our case is new, so we must think anew and act anew." Securing our homeland is the responsibility with which history has charged us. It is the mission which calls us to think anew and to act anew in defense of this Nation.

I thank you for the opportunity to testify today. I look forward to working closely with you as we rise to meet this challenge and accept this responsibility.

Thank you.

Chairman LEAHY. Well, thank you, Attorney General. I would note just in passing that such things as—whether we change the law or not, you still have to change the way you do things at the Department of Justice. Under the old laws, which we may be somewhat critical of, there are a lot of things we can do with today's technology that wasn't being done. A simple Google search on people's names, simple address searches, the ability to actually know what is in one agent's computer to another—those are things that come in more not as legal changes but management changes.

The House Select Committee on Homeland Security, which is chaired by House Majority Leader Dick Armey, has proposed banning the so-called Operation TIPS program that your Department plans to deploy next month. For those who are not aware of it, it is a program that enlists thousands, even millions of civilians as TIPS informants to report their suspicions to the Justice Department.

I just want to make sure I know how this is going to work. Apparently, your Department was so overwhelmed that when the Phoenix memo came in from trained investigators specifically pointing out Middle Eastern people with ties to terrorist organizations who were trying to take pilot lessons here in the United States, that couldn't break through. But now we are going to talk about millions of Americans, totally untrained, calling in to this TIPS hotline.

Let me ask you about this. Say a telephone repair person comes into your house and sees some pictures around of the World Trade Center, sees some books on Islamic terrorism. Let's say they pick up the phone and they report that suspicious information about the customer. What does the Department do? Do they send out an FBI agent to investigate, do they store the information in their data base, do they bring the customer in for questioning, or do they do all three?

Attorney General ASHCROFT. I am happy to have you make an inquiry about the TIPS program.

Chairman LEAHY. But given that specific thing, Attorney General, because it is not an unrealistic thing and it is something that might happen—somebody is in there and they see a picture of the World Trade Towers or they see books on Islamic terrorism—if they call that in, what happens?

Attorney General ASHCROFT. Well, first of all, the TIPS program is something requested by industry to allow them to talk about anomalies that they encounter, but it does not refer to a program related to private places like homes. So the particular hypothetical that you have posed is not appropriate to the TIPS program.

Chairman LEAHY. So a telephone repairman couldn't call that in?

Attorney General ASHCROFT. Telephone repairmen have the opportunity, just like you have an opportunity, to call the FBI at any time. Any citizen has the opportunity to call the FBI.

If we are talking about the TIPS program, the TIPS program is a program that mirrors a number of other programs that are already existing, similar to Harbor Watch or——

Chairman LEAHY. What you are saying is that that kind of a call would not go to the TIPS program?

Attorney General ASHCROFT. That is correct.

Chairman LEAHY. OK. Well, then let's say he is in his office repairing a telephone and he saw the same thing.

Attorney General ASHCROFT. The TIPS program—and I would be pleased to outline it for you—is one of five Citizens Corps program that are part of the President's USA Freedom Corps Initiative. He announced that in his State of the Union Address. It builds on existing programs that industry groups have, and because they are regularly in the public in routines, they can spot anomalies, things that are different, truck drivers seeing things happen that don't usually happen, and the like. This is focused on public places.

Chairman LEAHY. Well, then, Attorney General Ashcroft, let's see if I can follow this further. Let's say the truck driver delivers a bunch of books to the house on Islamic terrorism and calls it in. What happens to the information? I am trying to give a practical——

Attorney General ASHCROFT. Surely. Information provided on the TIPS hotline, which is like any of the other hotlines, would be directed to appropriate agencies that might have an interest in the information. Now, I would indicate that I looked into this matter and there had been some talk of a data base being maintained by TIPS. I made a recommendation that TIPS not maintain a data base. That recommendation, I believe, will be respected and TIPS will be a referral agency that sends information that is phoned in to appropriate Federal, State, and local law enforcement agencies so that it becomes a clearinghouse for people who see something which they think merits attention are able to call in.

Chairman LEAHY. But would that put that into their data base?

Attorney General ASHCROFT. The TIPS program——

Chairman LEAHY. No, no, I don't mean the TIPS program. Again, I am trying to do this because you talk about truck drivers, bus drivers, train conductors, mail carriers, utility readers, and so on.

Again, using that one example—and this is not a trick question or anything; I am just trying to make sure I understand what is going on because we are all getting asked questions about this.

Now, you are saying there will not be a data bank for TIPS, is that correct? It is your assurance to this committee there will not be a data bank?

Attorney General ASHCROFT. I have recommended that there would be none and I have been given assurance that the TIPS program would not maintain a data base.

Chairman LEAHY. And who have you gotten those assurances from?

Attorney General ASHCROFT. The individuals who have been shaping the program.

Chairman LEAHY. You don't want to tell us who that is?

Attorney General ASHCROFT. I am not sure exactly that I could name them, but I just know that I have indicated that there should be no data base and the word has come back to me that that is a point of agreement.

Chairman LEAHY. OK. They call this in under this program and somebody passes it on to the FBI. Do they put it in a data bank?

Attorney General ASHCROFT. Well, what the FBI does with data, what various agencies do with data, depends on the nature of the data.

Chairman LEAHY. But will this person ever know that this information was called in about them? Keep in mind this person may turn out to be the head of Islamic studies at Harvard or something like that, or it may be a kid doing his—if you want to confer with what is his name here, go ahead, but it may be a kid doing his term paper at the University of Missouri.

And you can understand the concerns. In my State, we love our privacy, no matter what party you belong to or anything else. The concern I get is will their name go in there somewhere and be in a data bank for something that, while it may have looked suspicious, might have a totally innocent example.

I mean, we did this back in the early part of the last century, and under the guise of being vigilant we ended up being vigilantes and it was a very, very sorry time in our history. And that was before we had data banks and computers. I just want to make sure that if these things are called in, something is not going to happen and somebody is not going to suddenly later on get out of college and they are applying for a job and they find that they have been disqualified because of something that was thrown in there.

Can you give us assurances on that?

Attorney General ASHCROFT. I believe I can. The maintenance of any records by any party—and, of course, no record is to be maintained by the TIPS organization. So other organizations would maintain records in accordance with their current guidelines, law, and practice, as they have maintained them over the years. So it doesn't represent any new recordkeeping protocols.

Chairman LEAHY. But I am concerned about what happens. I mean, Americans by and large are going to do the right thing. The flight school in Minneapolis contacted the FBI field office because they had suspicions. They did the right thing. Unfortunately, not much came of it, but they did the right thing.

In the Reid case, you had people who smelled a match or something. Fortunately today, because flights are non-smoking, if you light a match, you smell up the whole airplane. I am convinced they protected everybody on that airplane and stopped a terrible tragedy from happening.

The Government website that is recruiting these volunteers for Operation TIPS says the Government is interested in American truckers, bus drivers, letter carriers, train conductors, ship captains, utility readers, and others. What others?

Attorney General ASHCROFT. Well, what we are talking about is individuals who have a regular presence in the culture and would be able to witness anomalies, differences. Someone who is regularly in the neighborhood notices the presence of a truck parked in the neighborhood either doing surveillance or otherwise and wants to say, you know, that is strange, maybe we can get this referred to someone who might be able to make a difference in helping curtail some threat. So you have the ability of people who have a regular perception who understand what is out of order here, what is different here, and maybe something needs to be looked into.

It is with that in mind that this program would, I believe, provide a basis for getting information to people who could make a difference with it. I would indicate to you that one of the things we are doing at the Federal Bureau of Investigation, for instance, is improving our ability to handle information that comes to us and to make judgments in regard to it. The entire new section on analysis of intelligence that comes into the Bureau is designed to help us take advantage of information in ways that we didn't take advantage of it.

Chairman LEAHY. Well, let me speak to that because your Department says it plans to recruit a million volunteers in the ten cities where this pilot program is going to take place. But your Department also says that the FBI will take up to 3 years to get their computer system into the 21st century, and 3 years in computer time is a long, long time.

We know what happened before 9/11, where critical information that was sent to your Department never went anywhere. So if it is going to take you 3 years to get up to date where you can handle the information from your trained investigators, are you going to be able to collect and analyze tips submitted by one million informants, plus whoever else this comes to?

The reason I worry, and I think the reason that Congressman Armey and others—and this sort of goes across the political spectrum—worry is we saw in the 1960's where the FBI had a ghetto informant program to recruit people to watch their neighbors because they may be involved in political protest activity.

In 1917, the Department of Justice formed the American Protective League, which had volunteers to report on people who might criticize their Government. Sometimes, they turned into vigilante groups that raided newspaper offices, and they actually tarred and feathered some people.

That is why I say we can be vigilant, but we don't want to be vigilantes. I just want to make sure that this is protected. And you say they are not going into people's homes, but the parcel post

deliverers do go into the homes, or at least step in the door, and they are being asked to be recruited.

The cable people and all these others are being asked to be recruited. They sometimes have far more access to your home than any law enforcement can get with a search warrant. What I am very, very concerned about with this is we don't end up with a data bank of innocent activity at a time of justifiable concern, and it is justifiable. I mean, I don't doubt for a second your concern about terrorists and your dedication to stopping terrorism. I don't doubt that for a second.

But in doing that, let us not have a situation where someday when somebody is going in for a VA loan or they are going in for a job or whatever else, somewhere in this data bank a suspicious activity was reported because somebody didn't like their dog barking in the middle of the night, didn't like the political shirt they were wearing, didn't like the music they listened to, or whatever.

I think you share my concerns. I hope you share my concerns.

Attorney General ASHCROFT. May I assure you that I do.

Chairman LEAHY. Thank you.

Attorney General ASHCROFT. Your concern about the data bank was one which, when I looked at the program, I thought to myself the other organizations that operate, the law enforcement organizations, all have policies that are well understood, that have stood the test of time.

I simply recommended that there not be a data bank maintained in the TIPS program, that we have in these other areas which have these refined protocols that clearly understand the need to defend civil liberties—that any responsibility of TIPS simply be to refer to those agencies. In that respect, I think that puts us back into the conventional law enforcement context where we have safeguards.

The administration in this particular circumstance is responding to an industry request that we have uniform reporting opportunity for people in various settings. Some of the things have gone beyond what the administration proposed. The administration never proposed cable installers, and that is part of just the apocrypha or the extra information that gets developed here. But I agree with you that we don't want a new data base. I have recommended that there not be one and I have been assured that we won't have a new data base here.

Chairman LEAHY. Well, actually, from the Citizen Corps, the website, I took that. It talked about truck drivers, bus drivers, train conductors, mail carriers, utility readers, and others. That is where I get that.

Attorney General ASHCROFT. Yes. I made a remark about the cable operators because I have recently had cable folks in my house. You said cable operators and I said for sure I don't want them, and I looked on the list myself and found they weren't ever a part of the proposal.

Chairman LEAHY. I hope you get better cable service than I do.

Go ahead, Senator Hatch.

Attorney General ASHCROFT. I have told them that if I didn't get better service, I was going to call you and complain. You mean it won't help?

Chairman LEAHY. It hasn't helped me. I will call Senator Hatch.

Senator HATCH. General, I share some of the concerns about the TIPS program. But just so we understand what you are trying to do, in the aftermath of the Oklahoma City bombing, the FBI, as I understand it, received thousands of phone calls, especially with regard to the identity of John Doe 1 and John Doe 2, that they took, and those were the sketches that they had of John Doe 1 and John Doe 2.

Now, is that the type of law enforcement that you are talking about here, taking those calls, following up on them, seeing what you can do, trying to get to the bottom of terrorist activities hopefully even before they start?

Attorney General ASHCROFT. Yes. The effort obviously following the explosion of the Murrah Building in Oklahoma City was an effort to find the perpetrators and to reassemble the evidence necessary to provide a basis for a conviction that would lead to justice.

Really, what we are looking for now is to take a step in prevention. So anybody who sees things that are out of line that can help us prevent an attack by identifying something that might be worthy of our advance preventive activity and inspection in advance, we are asking for that kind of information as well.

Industry groups such as those kinds of groups like Highway Watch and Coast Watch that have involved industry groups before—they have suggested that a uniform reporting opportunity would be appropriate and that is what this TIPS program is designed to provide.

Senator HATCH. As I understand it, John Walsh, of "America's Most Wanted," has endorsed the TIPS program. How would this be any different from what he is trying to get, and that is people calling in to help find children who have been abducted under the Missing Children's Act that we have all worked so hard on in this committee and in the House as well?

Attorney General ASHCROFT. Together with Walsh, the American people may be the best law enforcement organization we have because they solve some very important crimes. It just so happens that today, in the USA Today newspaper, he endorses this program and concept in an editorial, which I think suggests that this is something every citizen can do to make America safer.

I think we have long understood that people have a real role to play in a democracy in a variety of settings, including in crime control and terrorism prevention. You don't have to move to live in a safer neighborhood. There are things you can do, and the people who are regularly present in our culture in various settings, if they see significant anomalies, we want them to be able to have an easy way to report those so that we can take steps to secure people.

Senator HATCH. Thank you. Your comments about not having a data bank, names, has been very reassuring to me because we are all concerned. We don't want to see a 1984 Orwellian-type situation here where neighbors are reporting on neighbors. We want to make sure that what this involves is legitimate reporting of real concerns that might involve some terrorist activity.

Now, General Ashcroft, some of the same left-wing Washington groups and their allies who have been smearing the judicial nominations have you in their cross-hairs as well; at least that has been my impression. No matter how successful you are in protecting the

American people from harm, while respecting civil liberties, you will be criticized for the effort.

There is no way that the Fourth Amendment is going to be set aside, or other constitutional provisions, is there?

Attorney General ASHCROFT. Well, no. Not only do I not have the authority to amend the Constitution, I don't want to amend the Constitution. I think it has served us well.

I have told the members of the Department of Justice to think outside the box, to think of new ways to help, but never think outside the Constitution. That has been the direction. You have got to think in new ways in order to avoid old things from happening again. Whatever your system is that allowed something to happen before, if you don't change your system it might happen again.

So we are trying to think of new ways and providing the basis for the right kind of information exchange between the CIA and the FBI, law enforcement, and intelligence. Leadership in that respect was taken by the Congress very early. Those kinds of ideas are the kinds of things that we are doing to improve our security.

Senator HATCH. I have been watching some of the criticisms of you in the press and elsewhere. No matter what you do, you are criticized, and I guess that is part of this thankless job that you have. But I want to speak for the American people in expressing the profound gratitude that we feel for the job you are doing.

I just want to explore a few areas of traditional crime and law enforcement that I find critically important. First, in the area of civil rights enforcement, I want to congratulate you. Many are concerned about recent reports of police brutality, so I want to commend you for sending Ralph Boyd out there to California over the recent problem out there where this young African American boy was slammed into the car and punched.

Attorney General ASHCROFT. The Inglewood situation.

Senator HATCH. I think that is important to do that, but what other steps have you taken to address the issue of police brutality?

Attorney General ASHCROFT. Well, we have been aggressive in this respect. For instance, in the Inglewood situation the Community Relations Service and the FBI were there very early. I personally called Mayor Dorn and I asked him if he would be pleased to receive the Civil Rights Division Chief of the Justice Department there.

We sent them there, with a view toward finding a way to solving the problems and changing any situation, if it exists, that is systemic or institutionalized so as to make sure we respect every American and that police operate within the appropriate limits of their responsibility and authority. We have done that in a number of instances and with some success, for which we are grateful.

You will remember a little over a year ago, the city of Cincinnati was racked with violence related to a police situation there, and by going and working hard with all parties to find a solution, within a year's time we had all the parties jointly come together, announced the changes that would be made, provided a structure for monitoring the success, so that we have a new plan, a new paradigm, a new way of working together in Cincinnati.

We hope that that model of being very quick to respond and working with all the parties together can get us to the place we

want to be, where people are treated with respect and human dignity, and the police have the opportunity, right, and responsibility to operate effectively, but there aren't abuses which might curtail the liberties of individuals.

Senator HATCH. Up until now, the FBI has been the law enforcement agency most responsible for identifying and preventing terrorist attacks in this country. As you know, Congress is moving quickly to establish a new Department of Homeland Security in response to the President's request.

Do you see the FBI's role in terrorism investigations changing with the creation of this new law, and if so, in what way would that process work?

Attorney General ASHCROFT. Well, certainly the FBI's role in investigating terrorism is a changing role. The restructuring of the FBI itself is substantial: the reallocation of 500 agents to the counter-terrorism portfolio, the construction or development of a special analysis section to do a better job of taking the information we get and making sure we connect the dots. The chairman made reference to the need to be able to connect and integrate information we get. It is a very important need. Director Mueller has reconfigured the agency with that in mind.

We are redoing the computer system, something the chairman also mentioned, and we want the computer system to be not only a modernized system, but we want it to be able to communicate with some of the other agencies in counter-terrorism which previously we haven't either had the authority to communicate with or haven't communicated with well.

Even the reports that are developed at the FBI have been in a different format, for example, than reports developed at the CIA and other intelligence agencies. I think it is important for us, if we are going to be sending reports and information into the new Department of Homeland Security for use by that department, that we have a format which is consistent with information provided and the format in which information is provided in other agencies.

So there is this massive undertaking of developing the right communications capacity, the right analysis capacity at the FBI. Yes, it will continue to be the chief domestic intelligence agency, but it is a retooled agency with a capacity to communicate more effectively with other agencies. It is a retooled agency with a vastly enhanced analytical capacity.

Then one other thing I would mention is the new guidelines provide a substantially enhanced capacity to gather information. You have to have improved gathering, you have to have improved analysis, you have to have improved communication, and those are the three cornerstones of the retooled FBI.

All of those things are things that are underway and we believe the FBI will serve America much more effectively as a result of these important reforms that Director Mueller has instituted.

Senator HATCH. Thanks to the chairman. He has allowed me to ask just one more question. I would like to ask this one because my time is up.

You have played a central role in revamping the FBI's antiquated investigative guidelines. That has been important to me. I understand that these guidelines routinely prevented the FBI from

taking the initiative to detect and prevent future crimes, as opposed to investigating crimes that had already occurred.

Our country, of course, expects much from the FBI. We are not content for your agency to solve an act of domestic terrorism after it has occurred. Are you satisfied that the new guidelines provide your agents with enough leeway to proactively investigate crimes that might occur, and are there any tools that Congress can provide to help increase your prospects of preventing terrorist attacks?

Attorney General ASHCROFT. Well, the new guidelines substantially improve a couple of things. We have learned, for example, from the circumstances that have been cited, some that the chairman cited.

For instance, the new guidelines allow cases both to be opened and extended by people at the local level, where they know best what is happening. The new guidelines allow agents to be able to get information on the Net, to the extent that information is available to the public on the Internet. Use of the Internet is something the chairman also mentioned. The new guidelines allow agents to go to public places.

I believe that those are substantial enhancements, and frankly I would look forward to working with the committee to develop additional ideas or responses. I don't believe we are ever going to be able to sit back and say, well, that is that, we are perfect now and we need not make adjustments. I want always to be in the idea business, to see if there are ways that we can improve our response to the threats.

Senator HATCH. Thank you. Thank you, Mr. Chairman.

Chairman LEAHY. The Senator from Utah speaks of the left-wing smear groups that seem to be attacking you.

Senator HATCH. My, but you are sensitive.

Chairman LEAHY. I assume he meant Grover Norquist in the New York Times yesterday.

All the more reason, Mr. Attorney General, that we want you to actually come to some of these oversights because I think you are the best spokesman for you and you should be able to be here.

Senator Kennedy?

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. General, welcome. Just quickly in regards to the TIPS program, my committee is the committee that has the responsibility for drafting the President's voluntary program. To my knowledge there is no language proposed by the administration that would authorize the TIPS program.

I think anyone that has information with regard to terrorist activity should report it to law enforcement. We all ought to encourage that, but the idea of encouraging this country to have neighbors spying on neighbors is not the spirt of volunteerism to be advocated. It seems to me that there are better ways to use funds in the law enforcement area.

You speak of TIPS being authorized under the President's voluntary program. It hasn't been submitted. It is not there either in our committee nor in the appropriations. So I don't know where you believe it to come from, but I invite your legislative people to

work with us to try and find it because we don't have any record of it. Further, I think it is inconsistent with the concept of what the President has outlined in terms of volunteerism, regarding people giving something back and making a difference in their community in contrast to what this program seemes to be about.

But let me go on into some questions with regard to a favorite topic of yours, and that is guns. The last time you appeared before the committee, which was in December 2001, I asked you about the Justice Department's refusal to let the FBI examine the background checks of the 1,200 people detained following September 11 to determine whether any of them had recently bought guns.

You responded that the law which provided for the development of the National Instant Check System indicates that the only permissible use of the National Instant Check System is to audit the maintenance of that system, and the Department of Justice is committed to following the law.

However, a report issued Tuesday by the General Accounting Office includes a legal opinion by your own Office of Legal Counsel, dated October 2001, that contradicted your later assertion about the law. The legal opinion stated, "We see nothing in the NICS regulation that prohibits the FBI from deriving additional benefits from checking audit log records, such as assisting in the investigation of the September 11th attacks, as long as one of the genuine purposes for the checking is carried out as permitted—the purpose of auditing the use of the system." The Office of Legal Counsel further observed that the FBI had been using this method of checking the system all along.

In light of the legal opinion written by your own staff, I simply can't understand why the Department decided to reject the FBI's request to investigate the gun purchases by suspected September 11th terrorists.

Attorney General ASHCROFT. The OLC opinion that was cited in the GAO report, stating that information derived from genuine NICS audits can be used to further other law enforcement purposes, is consistent with my testimony to the Senate Judiciary Committee last December 6 that the only recognized use now of approved purchase records is limited to an auditing function.

The purpose of any use of the records is auditing. If there are incidental law enforcement items that flow from the auditing, under the Brady law, then those can take place, but you cannot enter the records for other purposes.

Senator KENNEDY. You are saying that they cannot be used to investigate whether the terrorists violated the gun laws? Is that what you are telling us? Is that what you are saying?

Attorney General ASHCROFT. I am saying that information that comes available incident to an audit can be used for other law enforcement purposes.

Senator KENNEDY. Let's talk in practical terms. Are you saying that the FBI couldn't look through that information to find out whether or not those terrorists bought guns?

Attorney General ASHCROFT. I am saying that the FBI——

Senator KENNEDY. You didn't have the authority. Is that what you are saying?

Attorney General ASHCROFT. The FBI does not have the authority under the Brady law to use those records for criminal investigative purposes. The GAO report citing the OLC opinion indicates what is also true that if, in the auditing process, items of a criminal nature become available, then those can be pursued. But the law provides that the purpose for the maintenance of the records and the use of the records is for auditing purposes.

Senator KENNEDY. Well, General, if you are representing here to the committee that it is your legal judgment that the Federal Bureau of Investigation could not use those records to go back and find out whether these terrorists bought guns—do I understand that that is your legal opinion, in light of what your own legal staff has recommended? Is that what you are telling this committee today?

Attorney General ASHCROFT. My opinion is——

Senator KENNEDY. Yes or no?

Attorney General ASHCROFT. My opinion is that the authority to use those records is for audit purposes, and incidental things discovered in the audit for law enforcement may be pursued, but you cannot use those records for purposes other than auditing.

Senator KENNEDY. They cannot be used in investigating whether the terrorists had guns? Is that what you are trying to tell us?

Let me go on. In the GAO report that studied what the effect on law enforcement would be if the Justice Department implemented your proposal to reduce the current requirement for retention of background check records from 90 days to 1 day, it found that a next-day destruction would prevent law enforcement from investigating transfer of guns to prohibited persons, such as convicted felons or persons guilty of domestic violence.

It also found that the policy would eviscerate the FBI's ability to retrieve guns that were sold illegally. It observed that between July 2001 and January 2002, the FBI used retained records to identify 235 illegal gun sales. Only 7 of those 235 sales would have been caught under your next-day destruction policy.

Doesn't this report show beyond dispute that your proposed policy would be removing an important tool of law enforcement, undermining the public safety? Shouldn't that idea be scrapped and the 90-day retention be observed?

Attorney General ASHCROFT. Senator, I am very pleased to address this issue. The GAO report acknowledges that by modifying our audit procedures so that they are conducted on a real-time basis, we will not lose any of the basic audit capabilities. In fact, the changes will improve NICS audits by catching errors more quickly.

There is a way for us to use the records which are maintained. It is the records of personal identification that are not maintained, and the records that are maintained can be used to detect illegal purchases and to go back through the records that are maintained by the gun dealer to allow ATF and enforcement agencies to correct those situations where guns were illegally purchased or inappropriately purchased.

So I believe that the system that we have proposed honors completely the requirements of the Brady law, and by using the non-

personal information that can be maintained we can go back and handle those 230-some cases that the GAO has referenced.

Senator KENNEDY. According to the GAO: "Also, a next-day destruction policy could lengthen the time needed to complete the background checks and place additional burdens on law enforcement agencies, including State and local courts."

Let me ask about another issue. As you know, the Government of the District of Columbia is supervised by the Congress and local crimes are prosecuted by the Justice Department. D.C. law effectively prohibits anyone other than law enforcement officials from owning a handgun. In addition, rifles and shotguns are carefully licensed.

As a result of your views on the Second Amendment, as set forth in your May 2001 letter to the National Rifle Association and subsequently adopted as official administration policy, scores of defendants in D.C. courts have filed briefs challenging the constitutional D.C. gun laws.

To this point, the administration has refused to say whether it thinks these laws are facially unconstitutional or not. One Federal defender has described the administration's court filings as "basic and anemic to the point of unconsciousness."

Can you give us a straight answer today on this issue? Will the administration protect the safety of the District of Columbia's residents by zealously defending the constitutionality of its gun laws, or will these laws fall victim to the administration's Second Amendment ideology?

Attorney General ASHCROFT. The administration will defend all Federal guns laws, the laws which it has the responsibility to defend, and will seek to defend them effectively with full vigor and energy in court.

Senator KENNEDY. I would now like to move on to another issue, that of immigration. In April, the Justice Department announced that it supported a legal opinion stating that State and local police officers have the inherent legal authority to arrest people on civil and criminal immigration law. Since then, you have made various statements indicating that the Justice Department has accepted this opinion and is moving forward to implement it. Yet, the Justice Department has refused to make public the text of the opinion.

This is obviously of enormous concern to local law enforcement officials, who already are feeling overburdened by the pressures that are being put on them to deal with the challenges to law enforcement. It seriously undermines the ability of these departments to establish working relationships with immigrant communities and deters immigrants from reporting acts of domestic violence and other crimes.

In light of these concerns, do you still intend to issue this legal opinion, and if so, why has the Justice Department refused to provide Congress and the public with a copy of the opinion?

Attorney General ASHCROFT. No opinion has been issued and it would be inappropriate for me to comment on an opinion that has not been issued and on whether or not an opinion exists, whether that is alleged to exist but has not been issued.

I would say this, that on June 6, as part of an announcement regarding the national security entry/exit registration system, I stat-

ed that the Immigration and Naturalization Service would enter into the NCIC—that is the National Crime Information Center—information on specific aliens who pose a national security risk or have broken registration rules.

We believe it would be appropriate for local law enforcement, when they encounter someone who is listed in the National Crime Information Center's list as being individuals that are to be apprehended, for them to apprehend those individuals in conjunction with the Immigration and Naturalization Service. And to that extent, we would like to have the cooperation of State and local authorities.

Senator KENNEDY. My time is up, General. I just want to indicate in regards to the Civil Rights Division, that we had a hearing about the enforcement of civil rights and we wrote to the Department. We had Assistant Attorney General Boyd and we submitted a series of questions which have not been answered. If you would be good enough to take a look at it.

Attorney General ASHCROFT. That is the June 19 letter. I believe I am aware of it and we are working on a response, unless I have another letter in my mind.

Senator KENNEDY. It was a May hearing, but the 19th is the date of the letter, yes. We would appreciate it very much if we could receive the answers in a timely manner.

Attorney General ASHCROFT. Thank you.

Senator KENNEDY. Thank you.

Chairman LEAHY. General, I rather flippantly referred to Dan Bryant, who very appropriately was trying to hand you something. Both Mr. Bryant and Pat O'Brien have worked extraordinarily hard and we do appreciate it.

Attorney General ASHCROFT. I think your remarks about them were the nicest things I have ever heard said about them.

Chairman LEAHY. Well, I don't know what you say to them on the way back, but they work very hard and I didn't want in any way to be indicating that we don't appreciate how hard they do work for you and the Department.

Attorney General ASHCROFT. Thank you, and for America.

Chairman LEAHY. Thank you.

Senator Grassley?

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Before I turn to my questioning, I want to make an observation from just the exchanges we have had. I see a certain inconsistency and a certain irony in the questioning from the committee's majority on TIPS and on records of people that own guns. It seems like we have heard some serious privacy concerns about the FBI receiving voluntary tips from private citizens about what suspicious things these citizens might see in public places.

But these people on the other side of the aisle seem to think that the FBI should look freely through gun records that are kept private under our law. This is an inconsistency that seems to be more about restricting the right of Americans to bear arms than pro-

tecting our country. I would just observe that. And I think it is very clear, so maybe I don't have to point out the observation.

Mr. Attorney General, I am going to refer to a letter that you have answered, a letter with some questions that weren't answered, so you know where I am coming from. But I want to give some background so that I can show I am not picking on General Ashcroft, as opposed to Clinton or previous Bush or previous Reagan Attorneys General. I have been fairly consistent in observing bureaucratic dialog on the False Claims Act and fraud.

In the early years of the 1980's, I observed the Department of Defense trying to influence the Justice Department not to prosecute certain Defense contractors. I even saw recommendations when there was a small settlement with, I think, Sperry Rand, which company I don't think exists today, that something be settled in a very small way with a global settlement that everything that was pending against that company at that time would be absolved, and it was by the Justice Department. All of this brought us to the passage of the False Claims Act of 1986.

Now, we probably still have problems with the Defense Department, but I have been concentrating more on fraud within Medicare and the use of the False Claims Act in that area. So that is the background of where I am coming from over a long period of time.

I appreciate your agency's initial response to my letter of June 25. I was pleased to hear that it has been and will continue to be the position of the Department of Justice that under appropriate circumstances there may be liability under the False Claims Act for alleged kickback violations. I was especially pleased to hear that you continue to fight health care fraud and abuse diligently by investigating and prosecuting kickback violations under the False Claims Act.

This Act is the Government's most potent weapon in the war on fraud and abuse, and I would appreciate your assurances here today—hence my first question—that you would intend to continue using the False Claims Act to punish wrongdoing to the fullest extent of the law. I think your letter said that, but I still would like to ask you.

Attorney General ASHCROFT. Yes, sir, the letter reflects the commitment of the Department.

Senator GRASSLEY. OK. Now, as pleased as I am with the Department's position, I am disappointed that other more detailed requests for documentation on June 25 to Mr. McCollum were entirely unanswered. I asked for a variety of documents, employee lists, case files, and received none. It seemed to me that Mr. McCollum's letter kind of read like "look at my seven questions." He answered one and then said kind of take my word that we are going to be making sure that this law is fully enforced.

Now, I followup by saying that I want to follow President Reagan's advice, "trust but verify." I am submitting a copy of my letter for today's record, and ask that you do just that, verify your assistant's response by providing the documentation requested, and do it in a timely fashion.

I would like to make reference to what I am asking about so that my colleagues know. And if any of my colleagues do not think this is legitimate, they can challenge me on it.

I asked, for instance, within the last 2 years, has any HHS employee, with the exception of career staff at the OIG, discussed a change to or modification of the False Claims Act enforcement policy with respect to kickback allegations either in general or in a specific case. There was not a response, and that surely is not a confidential situation.

I asked for a list of all Department of Justice and HHS employees who have been involved in litigating the case against HCA, including those employees who have been involved at the line attorney, supervisory, and policy levels, and to note individuals that are involved in analyzing or prosecuting kickback allegations.

In addition, has any political appointee contacted you regarding the False Claims Act application to alleged anti-kickback violations, in general, or the case against HCA in particular? If so, provide details. We got no response and no lists, and I don't think any of that would be confidential.

I asked for a list of all Department of Justice and HHS employees in attendance at the meeting that was scheduled to take place on the afternoon of March 7 with Mr. Scully that he noted in his March 7 testimony to me before another committee of the Congress, and to provide a list of topics discussed at that meeting, as well as any notes. I am aware that some of that might be confidential, but surely not all of that would be confidential.

Then I asked for a list of all HCA cases involving alleged violation of Federal anti-kickback laws that the Department of Justice has either joined or declined to join within the last 4 years. I won't go on to read the rest of that part of the letter.

I am aware of the fact that some pleadings in False Claims Act cases are under seal to protect whistleblowers, but I think the bottom line is we are trying to get a snapshot of the Department of Justice's thinking here. We would like to see the arguments made in court to the fullest extent possible that the False Claims Act allows.

So that is the information I haven't gotten and I would hope that you would be cooperative with me in getting that information because it is very important in my making sure that there is no compromise of prosecution in these areas any more than there was back during the Reagan administration with Defense contractors.

Attorney General ASHCROFT. Certainly, Senator, I am pleased to receive this information. I will check and make an inquiry and will get back to you. I would like to work with you. Your record in the false claims area has not only been notable, it has been very beneficial to the American Government and the American people, and we will work with you to resolve these difficulties.

Senator GRASSLEY. I don't have time to read a lot of background for this question, but let me ask very directly in another area, in the area of cyber security.

In the case of the FBI, will all current full-time employees dedicated to the NIPC be moved to the new Department of Homeland Security, in addition to numerous details, and what provisions have been made to guarantee that critical transfer of the NIPC institu-

tional knowledge, in addition to employees, hardware, and open cases, have been made?

Attorney General ASHCROFT. It is my understanding that the proposed Department of Homeland Security would receive from NIPC individuals who assess vulnerabilities and develop a strategy to inform the business community and governmental community about how to harden or otherwise design our infrastructure, particularly computers, et cetera, so that they are resistant to attack.

It is my understanding that those who investigate computer crimes would remain in the FBI and that that function of law enforcement and investigation would remain. I am very sensitive to the idea that in that kind of a transition period we try and make sure that as much information travels with individuals who are moving as is important, and that we frankly establish, when the transfer is made, at that instant, the line of communication between these organizations will reside in different settings, because it is important that those in the investigative area be able to inform those in the prevention area of what new things they find in their investigations and the like that reflect things that might relate to the nature of the threat.

Sometimes, in the investigation you come across things that will inform an understanding of what kind of threat there is, and therefore should be part of whatever kind of hardening of the assets we have.

Senator GRASSLEY. You could help me if you would quantify the percentage of employees that might be going over.

Attorney General ASHCROFT. I will be happy to try and get that done for you, sir. That is something I simply don't have in this computer at this time.

Senator GRASSLEY. Mr. Chairman, I thank you.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Chairman LEAHY. Thank you.

I would note, partly in line with what Senator Grassley was saying, we really do want answers to the requests that we send. We have 23 outstanding requests to various parts of the Department of Justice dating back a year, July of last year. This kind of gives you an idea of what they are right here.

I am going to resubmit those as part of the written questions at the end, as well as the questions that Chairman Sensenbrenner and Ranking Member Conyers asked you about implementing the PATRIOT Act, partly because if we see there answers, it saves us having to ask them. I understand you haven't answered them either. I know it has been a little bit busy, but these are legitimate questions that Senator Grassley and I and Senator Specter and others have asked and we would like to have responses.

Senator Kohl?

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you.

Mr. Attorney General, when FBI Director Mueller testified before this committee early last month, I asked him about the complete absence of pre-boarding screening for passengers on chartered air-

craft, those private flights of which there are thousands each and every day across our country.

Today, anyone with a high enough credit limit can charter a 747, bring whomever they want on board and whatever they want on board, including, as you know, weapons, and potentially repeat the horrific events of September 11.

After much prodding, the TSA did issue a regulation requiring those passengers who charter the very largest aircraft, those over 95,000 pounds takeoff weight, or about the size of a DC–9, to undergo pre-boarding screening, just as a passenger on a commercial airline would. We are glad that they took this step, but it is not enough to simply cover about 2 percent of the private aircraft flights that exist.

Soon after that hearing, we received an encouraging letter from the FBI informing us that the Bureau shared our concern about private charter aircraft. Further, the FBI told us that Director Mueller has directed personnel from the FBI Counter-Terrorism Division to participate in an intelligence community working group on this issue. The FBI told us to expect their report by July 1 of this year. We have not yet seen the report or even an executive summary of it.

While I am pleased that the FBI seems to be taking this threat seriously, I am disheartened that they have not made it a sufficient priority to complete the report by their self-appointed deadline. It continues to surprise us that no matter how many administration officials we speak to—and we spoke to many, many officials at the very highest levels—we cannot seem to get this rather simple issue resolved.

So I would like to ask you here today where we are on this issue of security on private-chartered aircraft in this country, whether or not you consider it to be serious enough to require your attention and what we can expect to see resolved in the immediate future.

Attorney General ASHCROFT. Senator, I thank you for your leadership on this issue. We learned with a tragic sense of the consequences that an airplane and its fuel can become a weapon of very serious destruction.

The Transportation Safety Administration has the responsibility in this area, including charter flights, but we don't ignore that because they have the authority there. I will look into this matter and I will get back to you very quickly. I think this is a matter of priority.

We have on various occasions alerted the general aviation sector to the fact that those airplanes also can constitute a threat and that we need to be careful in regard to those. I will make this a matter of priority to report to you on the nature of these proceedings and find out why July 1 was not the delivery date for the report.

Senator KOHL. Well, I do appreciate that, and you and I have had a long and friendly relationship at the highest level of trust and so I believe you are going to. But I need to tell you I have heard exactly that from some of your Cabinet colleagues, exactly that answer, a very, very important issue. We understand that we don't want to have private aircraft flights traveling across this country in great numbers without any security. I will look into it

immediately and you can expect an answer of consequence at the very earliest date. I have heard that.

And I am not berating you in any way. I just want to make the comment, Mr. Attorney General, that we have heard that from some of your direct colleagues, and yet nothing happens and I am trying to figure it out. You know, I don't want to think, nor would you want me to think or the American public to think, that those who are well-connected and don't want to go through security checks on private charter flights, which are, of course, the privilege of the well-connected, can manage to have their way in this administration. You don't want me to think that, you don't want anybody to think that, because you don't want that to be true.

Attorney General ASHCROFT. I simply don't want unsafe things surrounding the people of the United States.

Senator KOHL. And there are these thousands of private aircraft flying around everyday and there is no security on these aircraft, not even something as simple that would satisfy me, at least initially, as these wand checks that take place at airports. People are stopped and they are given these wand checks.

These devices cost about $200 and the pilots of these chartered aircraft could be required to wand hand-check the passengers. We don't even have that, and I am asking myself, well, why wouldn't we do that? Why wouldn't people as interested in security as you all are, and above all do not want any kind of a repetition of September 11—why wouldn't we do that? I am trying to figure out who is trying to prevent it. Well, I will just leave it at that.

One other question. Many people are worried about the Justice Department's commitment to strong antitrust enforcement, especially in light of the Department's settlement of the Microsoft antitrust litigation earlier this year. Some people think that this settlement is not only a weak remedy, but also a reversal from the aggressive posture of the previous administration.

We continue to believe that the maintenance of vigorous competition in the economy is essential to getting consumers the best products at the best prices, and that active enforcement of our Nation's antitrust laws is vital to ensuring competition. Right now, Justice has a number of important antitrust matters pending, including the proposed merger between satellite television companies EchoStar and DirecTV, a merger about which we have serious reservations.

What would you say to people who are concerned about the priority that you are placing on antitrust enforcement, and can we hope to see vigorous enforcement of antitrust?

Attorney General ASHCROFT. Well, thank you very much for that question, Senator. I believe you will continue to see vigorous antitrust enforcement. We have moved forcefully against hard-core antitrust violators, such as price-fixing and bid-rigging.

During this past year, the Antitrust Division has secured almost $109 million in criminal fines, convicted 19 corporations and 20 individuals, sentenced 23 people to prison terms averaging over 18 months, and continued a trend toward likelier and longer prison terms for antitrust offenders. We mean business here. We have also secured a record criminal antitrust restitution order of $22.5 million in a criminal antitrust order.

I think maybe the best-known criminal action that we took was our case attacking price-fixing of sellers' commissions at fine art auctions by the world's two dominant auction houses, Sotheby's and Christie's. You are aware of the conviction there that resulted in a sentence in prison, plus I think a fine of over $7 million.

We take the integrity of the competitive environment very seriously, and we will be guided by the responsibility to maintain that integrity in our antitrust enforcement efforts and we will be aggressive in doing so.

Senator KOHL. I am glad to hear you say that and I am certain of your conviction in the matter. I think particularly nowadays, the American people need to know that we are interested in having a vigorous economy, a competitive economy, as well as an economy of integrity. The fact that you feel the same way is encouraging to me.

Thank you.

Attorney General ASHCROFT. Thank you.

Senator KOHL. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Next, we will go to Senator Kyl, and I should just note for scheduling there may be a vote starting at quarter of. Of course, we will finish the time of Senator Kyl and then take about a 5-minute break and come back, and the next to be recognized will be Senator Feingold. That will also give the Attorney General a chance to stretch his legs, if he wants.

Senator Kyl?

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman. Is there a way to turn this on?

Chairman LEAHY. Yes, there is a little switch right on the top, on the one on the right. Mine is on the left and yours is on the right. I don't know if this was a political statement or not.

I would advise all Senators these mikes are very, very sensitive. That is why we have got the on/off switch. A couple of very funny jokes were heard over the Internet last week and we don't want to do that again.

Senator KYL. Well, clearly they weren't jokes I told, Mr. Chairman.

Mr. Attorney General, thank you for being here. I appreciate your testimony, especially your written testimony, which I think captures very nicely the challenge that you faced when you came into the Department of Justice just before the events of September 11 and what has been necessary to change since then, and I am sure the change will take a while to work out.

One thing that I wanted to note is that, of course, tip lines have been in use by law enforcement at the State and Federal level for as long as there has been law enforcement, I suppose. I specifically wanted to note the fact that two of the most important investigations that were commenced right after September 11 were the result of tips given by private citizens in Tucson, Arizona, Mr. Chairman, where alert citizens, just regular folks, noticed something

very strange. And as a result of reporting it to law enforcement, two very important investigations were commenced.

One had to do with a lady who saw people of a certain description hurriedly copying passports, xeroxing passports at one of these public copying facilities, in an area of town that raised issues as well. Another involved a landlady who, after a couple of people moved out, noticed a lot of things about their apartment in the trash and so on.

You might have read about one or more of these cases, but these alert citizens reporting this information caused important investigations post-9/11 to be commenced. So I think it is important every now and then to illustrate the practicality of this kind of information being passed on to appropriate law enforcement authorities, and I urge our fellow Americans, without being snoops, nevertheless to be alert and to do that.

Mr. Attorney General, one of the things you commented on was bringing some of the laws, including FISA laws, up to date to reflect technology and the techniques of terrorists and criminals. Two of the items mentioned had to do with nationwide wiretap authority and trap and trace authority, to extend beyond the regular old telephone that used to exist to the use of cell phones and to obtain information about the points of origin and the places called not only on telephones, but also computers.

An additional element of change that has been suggested—and the FBI Director as well as the agent from Minneapolis who was in the news a couple of months ago strongly endorsed this and it is legislation that Senator Schumer and I have pending now—would remove the requirement in a FISA warrant case of having to prove initially a connection to a foreign terrorist organization or foreign country.

In your view, would that change be warranted? The probable cause requirement still exists. Would that kind of change be warranted and would it be useful?

Attorney General ASHCROFT. Well, I very much appreciate the concern expressed by you and Senator Schumer in this respect. Really, what it would provide would be a better tool in the event that we were dealing with a lone terrorist, unassociated or unaffiliated with terrorist groups. The proposal in that respect would seriously strengthen our capacity, and I think that is an undeniable sort of asset of such a proposal.

The Department's Office of Legal Counsel has come to the conclusion that it is a constitutional proposal, that it doesn't infringe the Constitution. Last year, the administration endorsed an identical proposal. While there is no formal endorsement at this time, I think this concept is a strengthening concept which would provide an ability to curtail the activities of a freelance terrorist not having connection to a terrorist group.

One person can plant a bomb on an airplane. One person could send anthrax through the mail. A person acting alone could assassinate political leaders, or a person can attack and kill intelligence personnel as part of terrorism, one person alone. So I very much appreciate the fact that you and Senator Schumer are sensitive to this, and we would look forward to working together to address these concerns with you.

Senator KYL. Thank you. Mr. Attorney General, it could also be a situation in which, at the time the individual first came to the attention of law enforcement authorities, there wasn't any specific indication of the connection, but there is sufficient reason to believe that a crime may be in the planning stages. So you could get the FISA warrant, only then to find out or be able to prove the direction connection to the terrorist organization. I am assuming that that could well be the case as well.

Attorney General ASHCROFT. That could very well be the case. It is not always apparent that people—especially in the days of complex communication where we now exist, they don't have to meet together to be acting together. So they may appear to be acting alone, when in fact, after closer inspection, we would find that they were acting in concert.

Senator KYL. And, of course, the purpose of the FISA warrant is to be able to further investigate, and that may be then when you find that information out.

Mr. Chairman, by I think a clerical mistake the legislation that I am referring to was not specifically assigned to this committee. I think there will be a hearing in the Intelligence Committee, to which it was assigned, but it properly belongs within—or at least we should take cognizance of it even if it is not assigned here, and it may end up being assigned here.

In any event, I hope that we can work with you. Senator Schumer and I both have an interest in moving this quickly and I hope that we can work to get action on this piece of legislation quickly.

Chairman LEAHY. If it is assigned here, we will take a look at it, and I appreciate what you said about the two citizens in Arizona who got the word out. Earlier when you were out, I was pointing out, though, that I just don't want the Department of Justice so inundated with this TIPS program that we repeat the same mistake that happened actually out in Arizona where they overlooked the Phoenix memo, which was an extraordinarily important memo. The balkanization, something that both the Attorney General and Director Mueller are working on, stopped that memo from getting up to the proper authorities prior to September 11.

Senator KYL. Sure, and of course to make the point that any law enforcement, be it the sheriff's office, the local police department, or the FBI, would be appropriate places for these tips to be called into.

The other thing, Mr. Attorney General, I would like to draw your attention to is a related piece of legislation that Senator DeWine has introduced that is basically the flip side of the bill that I was just talking about that Senator Schumer has introduced.

It essentially says that where you can demonstrate a connection to a foreign terrorist organization or foreign country, but you may not have the probable cause that would ordinarily attend to the granting of a FISA warrant, in that case you could still proceed upon reasonable suspicion, I believe is the phrase.

I appreciate your staff looking into the question of whether there is a possibility of marrying those two concepts, where you could have either/or. In other words, if you could make the definite connection to foreign terrorist organization or foreign country, the standard of cause might be less to get the warrant. If you can't

make that connection, then the standard of cause would be the typical probable cause.

It may be that we can formulate a really helpful change here in the law. And, again, not just taking a look at it, but trying to get this done quickly would be our goal.

Attorney General ASHCROFT. Well, I am eager to work with you, Senator Schumer, and Senator DeWine in this respect to examine the interrelationship that exists there and to discuss the potential of these varying standards which have legal ramifications and the like. I think working together would be a very good way to get it done, and done well.

Senator KYL. Now, finally, you closed your testimony, or I think you answered one of the previous questioners with the notion that you don't necessarily assume that at this point in time we have everything exactly right, that we have to look at things as they evolve. You are open to new ideas, and so on.

It is a two-way street. I think we invite the Department of Justice as situations change, as technology changes, or as you identify areas that need addressing to bring those to our attention, and if they require legislative change that we be able to act in a quick fashion, that we not let these things drag out too long, because very month of delay in making a needed change is an increased opportunity for a terrorist or a criminal to do their evil deeds. That is not something obviously that we should be supporting.

Is there anything else at this point, beyond the items that you mention in your testimony, that you think we might profitably look at in the way of making potential changes that you would alert us to or any other needs that you are aware of at this time that we should be addressing?

Attorney General ASHCROFT. Well, very frankly, the priority need for legislative change is the coordination into the Department of Homeland Security of the vast array of programs that have frontline responsibilities in defending this country. Digesting that and getting that done effectively has been a laudable objective.

I know that Minority Leader Gephardt, of the House, has indicated that—I think he is the first fellow that said we ought to get this done by September 11. That was an important commitment. I believe the Senate leadership has responded, as well as House leadership generally, to that challenge. I think that is the top priority we have now legislatively in defending the American people.

Senator KYL. I thank you very much. I especially enjoyed the Lincoln quotation at the end of your speech. It is quite apropos, I think.

Thank you, Mr. Chairman.

Chairman LEAHY. Speaking of FISA, we have asked, Senator Specter has and I have, some significant questions about problems the Department has had in FISA under either the new or old laws. We haven't gotten those answers and I think before we go too much farther we ought to find out how we are doing here.

We will take a break. Senator Feingold is voting. When he comes back, if I am not already back, he can start this up and we will go on and continue the usual rotation. Thank you, Attorney General.

[The committee stood in recess from 11:50 a.m. to 11:59 a.m.]

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD [PRESIDING.] We will continue the hearing.

I welcome you. Before I begin my questions, I would like to take a moment to just make a couple of comments. You talked in your opening statement about the need to, quote, "think anew and act anew." While it may be true that a review of the Department and Federal law enforcement resources and information-sharing capability is needed, and I agree with that, I certainly don't think you or the administration should be rewriting the Constitution and its careful checks and balances on all three branches of Government and its protection of the fundamental civil rights of all Americans.

The second thing I would like to say is to bring your attention to a letter I sent you yesterday asking for a report on the implementation of the PATRIOT Act. That letter requests a copy of your response to a similar letter sent by the House Judiciary Committee, which I think Chairman Leahy just referred to, as well as responses to some additional questions about issues like the use of the business records provision to obtain library records. I look forward to the earliest possible response to my letter, and I would ask unanimous consent that this letter be placed in the record.

General, on the issue of the round-up and detention of 1,200 individuals since September 11, one aspect of this issue that I find especially troubling is the Department's refusal to identify how many people are being detained as material witnesses and not for any criminal conduct.

Rule 46(g) of the Federal Rules of Criminal Procedure requires the prosecutor to submit a biweekly report to the court with the reasons why a witness who is being held for more than 10 days pending indictment or trial should not be released or have his or her testimony taken by video deposition, and the reasons why the witness should still be held in custody.

I would like to ask you if the Department has complied with this requirement, and if so, I ask you to provide copies of these reports to the committee.

Attorney General ASHCROFT. Senator, the material witness program is one that is court-supervised and it is the responsibility of the Department to comply with the rules as requested by the court. I know of no circumstance in which we have failed to comply with the orders of the court or the rules of the court in respect to material witnesses.

Senator FEINGOLD. Well, we would like some confirmation of that, because we have heard that the biweekly reports have not been filed. So, obviously, if you could provide copies of the reports to the committee, that would be a great help. Thank you, General.

I have also heard troubling reports that individuals being held as material witnesses have been threatened with retaliatory action if they challenge their detention and go public with their cases. Specifically, I have heard that the Justice Department has threatened to recategorize these individuals from material witness status to enemy combatant status.

I would like to know if this is true. Has a prosecutor or Department official threatened any person held as a material witness or their lawyer with retaliatory action if they go public?

Attorney General ASHCROFT. I have no knowledge of any such activity on the part of the Department.

Senator FEINGOLD. I would ask that some kind of determination be made to make sure that is not the case, and that you let the committee know the results. I am glad to hear that. This kind of conduct, of course, would undermine the integrity of our justice system, and I look forward to any further comments you may have on that in the future.

Attorney General ASHCROFT. Thank you.

Senator FEINGOLD. I would like to now turn to the issue of the detention of U.S. citizens. I have always believed that one of the most important principles of our legal system has been that Americans cannot be arrested and held indefinitely without charge or access to counsel or judicial review simply on the arbitrary decision of a government official, even the President.

Section 4001(a) of Title 18 of the U.S. Code, enacted in 1971, provides, "No citizen shall be imprisoned or otherwise detained by the United States, except pursuant to an act of Congress."

So I would ask you, General, what is the legal authority for the President's decision to transfer Jose Padilla from civilian custody to military custody and to hold him there indefinitely? I am especially interested to know whether you advised the President that Section 4001(a) prohibits indefinite detention without charges of U.S. citizens, and if not, why not.

Attorney General ASHCROFT. Let me address 4001 of Title 18, U.S. Code, which is the title dealing with the criminal law and with the criminal justice system.

The President's authority to detain enemy combatants, including U.S. citizens, is based on his commander-in-chief responsibilities under the Constitution, not provisions of the criminal code, and it is bolstered by the Congress' September 18, 2001, authorization to use force, which plainly includes the force necessary to detain enemy combatants.

Section 4001(a) does not, and constitutionally I don't believe it could interfere with the President's constitutional power as Commander-in-Chief. 4001(a) reads, "No citizen shall be imprisoned or otherwise detained by the United States, except pursuant to an act of Congress." As you mentioned, that was enacted in 1971.

While the language appears broad, the section as a whole plainly addresses the Attorney General's authority with respect to Federal civilian prison system detainees and not the President's constitutional power as the Commander-in-Chief to detain enemy combatants.

Senator FEINGOLD. Well, General, is there an act of Congress or even a court decision issued since 1971, since the date of that statute, that you believe grants the President the authority to transfer and hold Padilla in military custody indefinitely? If so, what act of Congress or court decision grants this authority to the President?

Attorney General ASHCROFT. Well, in 1984 Congress enacted 10 U.S.C. 956, which explicitly authorizes payment for the detention of enemy combatants, so that there are items that clearly make it understood and recognize what I believe is the constitutional authority——

Senator FEINGOLD. Does that statute refer to U.S. citizens being held as enemy combatants?

Attorney General ASHCROFT. It does not differentiate between enemy combatants. In that respect, it is very similar to the case law that does not differentiate between enemy combatants and others when it comes to detaining individuals who have been a part of an enemy action against the United States.

I might point out that even when 4001(a) was being enacted, Congressman Abner Mikva and others in the debate over it stated that the provisions did not interfere with the President's commander-in-chief powers, so that there is legislative history to indicate that it was understood when 4001(a) was passed that the law did not purport to in any way derogate that which was constitutionally established regarding the President's power as the Commander-in-Chief. No court has ever construed 4001(a) to apply outside the context of civilian detention, but these cases admittedly don't come up very often.

Senator FEINGOLD. Well, General, the law in 1971 was enacted following a long and troubling history in our Nation during which the United States detained 100,000 Japanese Americans, German Americans, and Italian Americans, not because they committed crimes, but out of a fear of what they might do. And I think there is serious dispute here with regard to your interpretation of what this——

Attorney General ASHCROFT. May I comment on that, Senator? The detention of citizens of the United States who are not enemy combatants but merely of an ethnic group, which I think you refer to in the detention of citizens of Japanese origin during the Second World War, is obviously a very different item than the detention of enemy combatants.

I think the Supreme Court case law recognizes the difference between enemy combatants and others in this respect, and it is something that we are very conscious of and sensitive to.

Senator FEINGOLD. General, let me ask you this, given the importance of this practice apparently to the administration. Other than Padilla and Hamdi, are there other U.S. citizens currently being held as enemy combatants, and if so, who are they? Why are they being held as enemy combatants, where are they being held, and how long have they been held?

Attorney General ASHCROFT. I am told there are none. I know of none and I am told there are none.

Senator FEINGOLD. It is just the two of them, then?

Attorney General ASHCROFT. That is my understanding.

Senator FEINGOLD. Is that correct? That is your understanding?

Attorney General ASHCROFT. That is the best information I have. Now, I don't know whether someone might emerge and confess himself to be an American citizen, having been serving in an enemy force.

Senator FEINGOLD. But you are not aware of any such person?

Attorney General ASHCROFT. I am aware of none other.

Senator FEINGOLD. Let me turn to one other question, the issue of racial profiling that you and I have discussed many times. During your confirmation hearing, you said that you believe racial profiling is wrong and should end, and you pledged to work to ad-

dress the issue, once confirmed. In his first address to a joint session of Congress in February of last year, President Bush also said that he believed racial profiling is wrong and should end in America.

Do you remain committed to working with me and Representative Conyers to get a bill to the President's desk this year that will accomplish that goal—to make it absolutely clear that racial profiling is wrong and should be understood as illegal in America?

Attorney General ASHCROFT. Yes.

Senator FEINGOLD. Thank you. My time is up and Senator Specter is here and I am going to turn to Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman.

Attorney General Ashcroft, when you sat next to me on this dias a couple of years ago, I think it is accurate to say that you shared my frustration about getting responses from the Attorney General. I had raised some questions with you in your testimony last December, and before getting to the substance of the matter I want to ask you about how busy you are.

Now, maybe you are too busy to respond to Senators' letters, and if you are, frankly, I can understand that. But if that is so, then I know I can always track you down or find you at the White House. But when I wrote to you back on December 20 relating to your testimony at a Judiciary Committee hearing on December 6, I asked you to provide in writing a standard for your action in continuing to detain aliens after they were ordered released by both an immigration judge and by the Board of Immigration Appeals.

Then I suggested in a letter a standard which would be lesser than probable cause, the standard of "stop and frisk," which was an articulable, reasonable suspicion that an alien is involved in terrorist activity or is a threat to national security.

When I didn't receive a response, I wrote you on March 7, asking you about it and sending a letter. Then we had a brief conversation in the White House one day, and I received a letter from Assistant Attorney General Daniel Bryant which did not answer the question at all, but in critical part said only, quote, "While the INS has not adopted a particular legal standard as to when the automatic stay procedure should be invoked, the INS has implemented a multi-layered review process that includes the requirement for approval at the headquarters level to ensure that the automatic stay mechanism is invoked only where appropriate."

Now, I know you would not be surprised that I found that response inadequate, because we need standards as to when you are going to detain somebody and it is not sufficient to have a multi-layered review process. Before the matter got to the multi-layered review process, as I noted in the first letter, there had already been a determination by the immigration judge to release, and that was stayed by the Board of Immigration Appeals. Then when they ordered the immigrant released, that was stayed automatically by your authority as Attorney General.

So it is simply not sufficient to have multi-layered review processes within the Department of Justice unless you at least articulate a standard for somebody being a security risk.

Now, as you know by this time, being totally familiar with the process from your years of experience, there are two parts to my question. No. 1 is how do we communicate with you and are you really too busy to respond? As I already said, I will accept that as an answer if you are getting lots of letters. I don't think you are getting too many from the guy who sat next to you in the committee.

So I wrote to you again on May 23 and referenced Bryant's response and noted that I don't write to you very often. In fact, this was the first letter that I have written to you since you were sworn in. I had a good chance to talk to you and perhaps even help you a little in the confirmation hearings.

So the two questions are, Mr. Attorney General, how do we communicate with you—let's take that one up first and then I will ask the second one.

Attorney General ASHCROFT. Well, first of all, I commend the communication in which you are now engaging. It has my attention completely and I want to respond to you. I think I detect that you have a slight tongue in cheek. I am not too busy to communicate and I will do a better job. I will instruct my staff to make sure I do a better job.

If you want to ask a second part to your question——

Senator SPECTER. Well, the second part, Attorney General Ashcroft, is we need a standard because detention is a very important matter and there are many who are raising questions about whether the Attorney General ought to have the authority to detain after the immigration judge has said release them and after the Board of Immigration Appeals has said release them.

We are living in very, very difficult times and I am aware of the tremendous responsibility which the President and you have on the issue of terrorism. But there has to be a standard on what goes through the minds of your subordinates on this multi-layered appeal as to why a person is being detained. It is not enough to say there is unfettered discretion in the office of Attorney General.

Attorney General ASHCROFT. Let me just address this automatic stay situation and explain it to the extent that I can with my knowledge that I have now, and I may need to get back to you further on this.

The regulation preserves the status quo pending appeal in instances where the INS seeks to detain an alien but the immigration judge orders him released. That is what the controversy is about. The INS on a few occasions has used this authority, but never has one of these cases come up to me during my time as Attorney General yet. So we haven't had that situation arise.

A case would reach the Attorney General under the system only if the Board of Immigration Appeals ordered that the alien be released and then the INS said, no, we are not going to release him, we are going to appeal this to the Attorney General. That has not yet happened.

Now, you made a suggestion——

Senator SPECTER. That has never happened, Attorney General Ashcroft.

Attorney General ASHCROFT. Not since this regulation has been passed.

Senator SPECTER. And when was the regulation passed?

Attorney General ASHCROFT. In September or October of last year.

Senator SPECTER. Well, I find that very surprising, in light of the reports about the detention of so many immigrants and so many reports about detention generally that this kind of a situation would never have occurred.

Attorney General ASHCROFT. We have complied with the orders or the appeal has not reached me in every instance and we have not had a case in which I have been asked—a case certified to me for my decision to restrain a person that has been ordered released by the Board of Immigration Appeals.

Senator SPECTER. And when you say to you, you mean to your office?

Attorney General ASHCROFT. To the Attorney General, because that authority resides in the Attorney General.

Senator SPECTER. Is that a non-delegable responsibility?

Attorney General ASHCROFT. I believe it is non-delegable.

Now, in terms of a standard, as we have been wrestling with these issues that you have raised, but you have raised in the absence of a case that has actually come to me, but it is important to have a standard in advance, one of the problems is that if the only standard is national security, I think that is an inadequate standard.

I think you might want to include, for instance, the potential of violent crime also being a standard that would be included there, and expressing a standard might have—there may be reasons when you are talking about an alien who is being detained during this process of final adjudication.

Senator SPECTER. Beyond, though, the issue of national security or criminal conduct, there needs to be some articulable reason why that person is a threat to national security. Or if you are going to categorize it as criminal conduct, I think that is a tougher line, candidly, to sustain.

National security gives greater leeway, especially in this era. But even with national security, I believe you have to have, if not probable cause—a reasonably articulable suspicion is a standard lower than probable cause, but at least a standard. Maybe that is not the only standard, but, Mr. Attorney General, I think we need a standard. Do you agree? You are nodding yes. I just hope you agree. You are nodding. Maybe it is not "yes."

Attorney General ASHCROFT. I certainly wouldn't make the decision absent some reference to what I believe to be important standards regarding national security and the security of the American people.

One of the standards that is used in cases, though, in which you maintain custody of an individual pending the outcome of an adjudication is the flight risk. That is also a standard that is used. You know, we have 300,000-plus people that were released by immigration authorities pending the adjudication of their cases and they

have just dissolved into the American community. Risk of flight is also an important thing.

I think these matters can be complex. They can relate not just to national security, but whether the ultimate adjudicated decision will be honored or not. So it is not just a national security issue or a violent crime issue. It has to do with the circumstances of the individual who is the subject of the adjudication.

Senator SPECTER. Well, I would agree with you.

My time is up and I will be very brief, Mr. Chairman.

I would agree with you that risk of flight is a reason for detention, but there are standards. That is essentially no bail, ties to the community, a job, responsibility generally, factors which have been delineated very, very carefully over a long period of time.

But when you talk about national security, it is different. There, we are in an era where we are very much at risk, but I wish you would take a look at it and respond to me at least before the next oversight hearing.

Attorney General ASHCROFT. Thank you.

Senator SPECTER. One other brief comment. The committee is considering the standards for issuance of warrants under the Foreign Intelligence Surveillance Act, and I have taken that up in detail with FBI Director Mueller and am awaiting a response.

But from the testimony of Agent Rowley and from what we have heard in our inquiry, this is something which I think you ought to look at, Attorney General Ashcroft, because I believe that the FBI, and in turn the Department of Justice, are not imposing the appropriate standard. They have got too high a standard. The standard that Chief Justice Rehnquist articulated in Gates, going back to an 1813 decision by Chief Justice Marshall, turns on suspicion.

I know the frustration you had with me on the Wen Ho Lee matter, on the FISA. We are going to be continuing our inquiry there, but I think that is something, as soon as you give me a standard on the issues I raised today, that you might want to take a look at.

Chairman LEAHY. And note the fact that both Senator Specter and I have signed letters on this and we have not gotten answers. I share the Senator from Pennsylvania's concern that unnecessary hurdles are being put up by the Department of Justice in seeking FISA warrants. I think a better job could be done.

The Senator from Pennsylvania has spent more time on this than any other member on this committee and I hope those questions will be answered.

We will go to Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman.

Attorney General ASHCROFT. Mr. Chairman, may I?

Chairman LEAHY. Yes.

Attorney General ASHCROFT. We would like to work with you on this. The Constitution provides that no warrant shall issue absent probable cause, I believe is the language, and I know the concern this committee has for observing the Constitution. There is where the difficulty comes in reducing the standard for the issuance of warrants.

Now, maybe there is a way to categorize things as not a warrant, and I don't know all this case law thoroughly, but that has been

our sticking point. We will be happy to work with you because we want to make sure we are doing what we can to make available every investigational tool to curtail terrorism.

Chairman LEAHY. General, the first thing you might do, though, is look very carefully at the questions that Senator Specter and I have sent you that we have not gotten answers to.

Attorney General ASHCROFT. We will look at it carefully.

Senator SPECTER. Just one final comment. I agree with you on the necessity for constitutional precision, but the Supreme Court has spoken on it. In *Cranch*, in 1813, Chief Justice Marshall, and then repeated in *Illinois* v. *Gates*, picked up on the opinion of then-Justice Rehnquist, that probable cause does not require a preponderance of the evidence more likely than not.

The opinions talk about suspicion and that would pass constitutional muster, and when you deal with a warrant under the Foreign Intelligence Surveillance Act, as we know without getting into the specific cases, we are just talking about the most deadly perils.

Chairman LEAHY. Eventually, we are going to have to have a hearing specifically part of it. It will have to be in a classified session, but we will have it. Again, that is the reason why we want you to answer the questions we have sent you.

Senator Schumer?

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. Thank you, Mr. Attorney General. It is sort of interesting. There seems to be a theme that runs throughout today's hearing in different ramifications, and that is the boundaries on privacy, particularly in a post-9/11 world, whether we are dealing with the TIPS program or guns or Padilla—well, Padilla is a little different—or the things Senator Specter asked about.

I think the change is sort of an interesting one. Since, post-9/11, we are all sort of on the front line, since we feel there might be domestic harm coming to us—we are not just fighting an overseas war but a harm here at home—I think it is natural that we reexamine these boundaries, and it is nothing new in our Constitution. I suppose one of the great debates that the Founding Fathers had was the age-old discussion about how much security versus how much freedom, privacy being a form of freedom.

I guess the comment I would make before I get to my questions is I think where the Justice Department goes awry, when they do—and they have done it, in my judgment, at least frequently—is not in the values they come up with. We can argue those, but there is virtually no discussion when the boundaries of privacy change.

A program, a new foray is issued, with very few guidelines, with very little elaboration, and then everybody sort of gets their hackles up, whether it was military tribunals or Guantanamo or with Padilla, when somebody is a foreign combatant, particularly when they are a citizen. And there are no guidelines, absolutely none, and everyone scratches their head and says "how far are they going to go?"

I think if there were ever a place where the Constitution wanted discussion between the executive branch, which tends to favor secu-

rity, and the legislative branch, which tends to favor freedom or privacy, it would be in this area.

My humble suggestion to you is that we have more discussion on this, that you present the problem to us and we have a back-and-forth. The few times that has happened when you require legislation, such as in the USA PATRIOT Act, I think you will find that the committee has not been unreasonable and we have come up, as you said in your testimony, with a very good product.

I was proud to vote for the PATRIOT Act. I thought it was balanced, but I thought it dealt with the new realities. I realize that there are some in the civil liberties community who say don't change anything. That is unrealistic, in my judgment, but it is not unrealistic to say let's vet it, let's have discussion, let's air it, and we will probably come up with a pretty good view.

I have to say—I wasn't intending to do this—I find a lack of that in just about every area we discuss, and it leads to problems for the Attorney General and for the Justice Department. So I am going to ask my first question to give you a chance on this maybe to do it.

To me, the TIPS program is not the big issue. You know, if someone sees a howitzer in someone's backyard, they should report it, they should let somebody know.

Maybe you and the Attorney General would disagree with me on that.

Attorney General ASHCROFT. I won't disagree with you, but maybe the Senator from Vermont would.

Chairman LEAHY. I don't have one in my backyard.

Senator SCHUMER. We don't want somebody who is looking at the electric meter to look at the books on a shelf in someone's basement and report it in. I think you could easily come to rational distinctions on that. Again, we have no guidelines.

But to me there is a more troubling privacy issue, and that is the posting of cameras in public places to monitor activity. This is something we are not accustomed to in the United States. The Statute of Liberty, the national Mall, or the intersection at First and Elm Street in a small town—people are worried about being watched.

The problem here is that there are no standards, once again. Can you zoom in and read lips? How long are the tapes kept? Are we using biometric evidence? I know there are some in your Department such as Viet Dinh—he is the head of the Office of Legal Policy, an important office, and he has said there is no right to privacy in these public places.

I happen to believe that while you lose some rights when you are in a public place—obviously, it is not the same as when you are in your home—there probably should be some limits and Americans, regardless of ideology, would feel comfortable. These are complicated issues. I don't think we can just sort of do them on the back of an envelope, but I am putting in a bill that would set up a little commission to recommend guidelines for these types of cameras.

Whether you agree with me or not about some right to privacy in public places, or agree with Dinh's view that there is not, what do you think of the idea of such a commission to start studying this

and having a little dialog on it, again mindful of the post-9/11 changes and the different world in which we live, but we still treasure our privacy and our freedom?

Attorney General ASHCROFT. Well, first of all, I think all of us have an insecurity about the fact that we might be on film all the time. I think you have touched something that all of us feel because virtually everything that happens somebody seems to have recorded on videotape. Very frequently, it is beneficial. We just deployed people to Inglewood, California, because someone was videotaping. The institutionalized videotape there at the service station may not have been as good as the privately undertaken one.

This is the kind of issue which I think a number of us feel might be worth discussing, and so I would be happy to do that with you. I think whether or not there is, in fact, such a right—maybe it shouldn't dispose of the issue. Maybe there needs to be a protection if there isn't one, and that is obviously what the policy opportunity that you enjoy as a Senator is. And if one is created, then it would be my job to defend it.

Senator SCHUMER. I would love to have a discussion. I would ask you to entertain seriously supporting the kind of legislation that I have mentioned, and I will show it to you before we introduce it.

A second question: As you know, Miguel Estrada is a nominee to the D.C. Circuit Court of Appeals, and several weeks ago the committee asked you to produce memos Mr. Estrada wrote when he was a lawyer in the Solicitor General's office at DOJ. You have refused to produce those memos, claiming privilege.

I understand that former Solicitors General, including some Democrats, backed your position. But as you know, that has not always been the policy. I have here in my hand a whole pile of memos of people in similar positions. During the consideration of Justice Rehnquist to become Chief Justice, the committee was given internal memos that he wrote when he was a clerk to Justice Jackson. During the consideration of Robert Bork's nomination to the Supreme Court, the committee was given internal memoranda, non-public-related material related to Bork's work in the Solicitor General's office.

I, for one, don't want to vote on Mr. Estrada unless I really know his positions. You know what happens when they come before us. We get a lot of bobbing and weaving—"I will follow the law, I will follow the law, I will follow the law"—and we really don't know what someone thinks. And you know my views are quite strong on believing that before I vote for a judge, I want to know their judicial philosophy or ideology.

So my question to you is the following. Given there has been precedent, what is the harm in us getting these memos? We can have a much fuller idea of how Mr. Estrada thinks in a legal way. He is not a judge, so we don't have a record, and we should know quite a bit about someone being appointed to the second most important court.

A former supervisor of Estrada said he advocated extreme positions aligned with his own interests rather than the Government's. That is a pretty strong argument not to support Estrada, unless we could see that the memos disprove that.

What is the harm in giving us those memos and increasing our knowledge of what this gentleman, who is obviously a very intelligent man, but that doesn't answer the whole question of whether he should be on the D.C. Circuit—what is the harm in giving those memos to us?

Attorney General ASHCROFT. I think this relates to the principle of deliberative work product, where individuals should be writing for their best service to the individuals for whom they are writing to give them the best information. They shouldn't be writing in anticipation of what will be someday subpoenaed and looked at, and what will be held against me if I articulate things that are going to be important to the person making judgment in this setting.

If I were to say to this individual, these are the important considerations that you have got to understand here, are these somehow going to be used against me later, so should I tone down my response? Should I adjust what I am saying because someday a Senate committee or someone else is going to want to look at it, and should I do things that are more consistent with my aspiration to be a judge someday instead of my responsibility to serve on a particular case? I think that is really what we are talking about.

Senator SCHUMER. With all due respect, sir, he was not just a lawyer serving a client. He was an employee of the Government serving the Constitution, and it is our job to figure out how he interprets the Constitution. Without these memos, it is much harder to do. We have done it before. It hasn't crippled the Government. I mean, there is ample precedent. I didn't go through all of them. This is filled with different people's internal memos that habitually used to be given.

Attorney General ASHCROFT. I could give you an example. For example, I have said to people I want your best judgment about this argument and how it can be most effectively made. They write me a memo about that because I want to be able to guard against that particular line of argument. I want to be able to anticipate it, use it, and I think that is not necessarily their position.

I think that is the reason former Solicitors General, as you noted, have said this would impair the ability of such individuals to serve in those responsibilities. And to chill the excellence which is required is to deny the national purpose that you make reference to. You want them to give their best judgment.

I can't tell you how many times I have made that kind of an assignment: Give me the best argument from this perspective. It was my anticipation of a perspective, not someone else's anticipation of what job they wanted. So many former Justice officials—and they are both Republican and Democrat—both support his nomination and I think would also have reservations about this kind of work product being compelled by the committee.

Senator SCHUMER. Thank you. My time is expired, Mr. Chairman. I have a question I would like to submit in writing. We are having real trouble on the Canadian border in the sense that the searches of people as they go through and the scrutiny has greatly increased. It probably should, but the backup is enormous, causing real trouble in Buffalo and other areas in terms of commerce. I have some questions in writing about getting more people to that border, figuring out what the process is for you and for Customs,

and I would just ask that I get an answer back quickly because we have real problems. It is not an ideological question, but it is a serious problem we face. I am not going to ask you to answer that now because my time is up.

Chairman LEAHY. And as one who is married to somebody of French Canadian dissent, and I hasten to add was born in the United States, first generation—she still has a lot of family up there—I have mixed emotions about how easy we should make it for someone to come through.

[Laughter.]

Chairman LEAHY. But as the Senator from New York has stated, it is a major issue. I think the Senators from Michigan would tell you the same, and so on.

I would invite you to come up and see the border sometime. We all share the same interest. Most countries would give anything to have a border that long with such a friendly ally, and we should work more and more to do what we have to do to facilitate going through. And I would invite you up to the border any time you would like to come and join me.

Attorney General ASHCROFT. Well, I was in Canada working with Canadian authorities this last week, or earlier this week I should say. They have raised this issue with me. It is an important issue. The security of our borders is very important. That is one of the things that I hope can be most successfully addressed in the new Department of Homeland Security. Pending action by the Congress, it could well be that by virtually this time next month there would be an integrated capacity to have Customs and INS working out of the same portfolio, so to speak.

We desperately need to have the kind of security that protects the border, but the kind of facility that provides support for the joint enterprise that Canada and the United States very frequently have. It is very important. I agree with you wholeheartedly.

Chairman LEAHY. The Senator from Alabama has been waiting patiently. Please go ahead, and then we will go to the Senator from Washington State.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. It has been a very interesting hearing and it is a pleasure to have the Attorney General back before this committee, the one he served so ably on.

It is not an easy task keeping everybody in this Senate and in the country perfectly happy, Mr. Attorney General. They complain on both sides that we didn't have enough computer systems, we didn't have enough data to identify terrorists. And then when you create a system that can put more in it, we get complaints that civil liberties are at risk. I think that comes from both left and right. We have some paranoid people on the right, also.

I would just say that I know the basic law. It is applied in courts probably 10,000 times a week in America, everyday, and if you are at a place where you have a right to be, whether you have been invited into somebody's house or out on the street, and you observe a criminal act, you should report it. That is basic.

Now, there is a danger. If you deputize people and they are, in fact, quasi-law officers and then they go in under certain circumstances, you could be subject to a motion to suppress and it would be improper. But the Constitution protects us from unreasonable searches and seizures and requires probable cause. I don't think that is an absolutely in-concrete standard and one person can perfectly interpret that under all circumstances.

I do believe Senator Specter is correct. I have heard him and been through the matters that he has discussed in the past, and I do believe, in the Department of Justice, you have people too timid in some of these areas with regard to searches and seizures.

You know, as we look at this historical perspective for these kinds of investigations and monitoring of people who may be a threat to our country, I think we know there is a constant tension there. Chief Justice Rehnquist, in his book a number of years before the attack of September 11—All the Laws But One is the title of it—notes that the balance in war time tends to shift toward order. And sometimes in the past, as he documents, we have gone beyond what the Constitution would sustain. We have violated State statutory laws, also.

He recounts that at different times during the Civil War, World War I or II, the Federal Government suspended the writ of habeas corpus, tried civilians in military commissions without a jury, interned people based on race without individualized determinations that they were threats to national security, and suppressed anti-war speech and press articles. I would add during the Korean War the Federal Government seized privately owned, lawful, legitimate steel mills that were not connected to criminal activity.

Placed in context, it is clear that the constitutional implications of the Bush administration's anti-terrorism efforts are modest. They are modest in their impact on our legal system and any constitutional rights that we have. The administration has not suspended the writ of habeas corpus. It has not required persons to be tried to this date in a commission without a jury, a citizen. It has not authorized the internment of citizens based on race or without individualized determinations that they are a threat to national security.

The administration has not attempted to suppress anti-war speech or press articles, and the administration has not seized privately owned, lawful businesses. Indeed, none of these great constitutional issues of American history concerning civil liberties are raised by your policy, and I think that is important.

In fact, I would say I am not aware of any member of this Senate or any court that has held that any of the policies contained in the PATRIOT Act we passed or the actions you have taken are in violation of the Constitution or statutory law. What we have done and what I hope you have done, and I believe you have, is attempted to focus on gaps and holes in that law and tighten it up and make it more realistic in the face of this threat.

Would you agree that that is your view, Mr. Attorney General?

Attorney General ASHCROFT. We certainly have tried to focus on the gaps. We had a gap in communication between the intelligence community and the law enforcement community. The USA PA-

TRIOT Act removed some of the barriers that sort of made those gaps possible and we have attempted to eliminate those.

We had a gap in investigative authority when we told FBI agents that they weren't eligible to look on the Internet, in public places on the Internet, for websites that would have bomb-making or anthrax development procedures and lessons on them. We had gaps because we required too much to be done in Washington and didn't give enough authority to our agents in the field, so we have tried to adjust those things.

Yes, we are trying to change and the debate is good. We get people on both sides of the debate providing that tension which you mention, and in the tension of that debate we can arrive at a balance that is good for America and I believe we have done that.

Senator SESSIONS. I hope so. I don't believe it is necessary that we violate any of our statutory or constitutional laws, and I would oppose that. I think that is just important for us to note.

Mr. Attorney General, I know you know Michael Spann, a native of Alabama, Winfield, Alabama, one of the great towns in the State, one of the best high schools—beats other high schools academically consistently in test scores—he went to Auburn University, the Marines—was killed in an uprising at Mazar-i-Sharif, the first victim in this war on terrorism of our military.

Let me ask you this. His father is unhappy with the plea bargain, the 20-year sentence. He questions other things about the plea and desires to appear in court and express his views on this subject to the judge. Under the Victim Witness Act that has been in effect for some time, I believe he would be covered under that.

And let me just ask you, will you support his right to appear in court and express his views on the appropriateness of the sentence that would be imposed?

Attorney General ASHCROFT. Senator, I will look into that. My heart goes out to the Spann family. The service of their son was valuable to the United States of America and it ended tragically. The court case, I believe, that you are talking about is the John Walker Lindh case.

Senator SESSIONS. That is correct.

Attorney General ASHCROFT. I believe that the plea there was a substantial plea. Twenty years is about the equivalent of the amount of time that Lindh has been alive. It is a substantial sentence, and as part of the plea agreement Lindh is required to cooperate with the Government, including testifying and providing intelligence information in future proceedings, if appropriate. The resolution of the case also, of course, frees up resources to be devoted to other cases.

My heart goes out to the Spann family. I will confer with Justice Department attorneys about the best course to undertake in the court proceedings.

Senator SESSIONS. Well, let me just say this. I believe it is within the spirit of the Victim Witness Act that he should be allowed there, and his widow, also, if she chose to appear. I see no reason why he should be denied the right to appear in court and express his views.

In fact, the whole Victim Witness Act was designed to ensure that prosecutors don't enter into secret plea agreements and vic-

tims not have a chance to have their say. I would like for you to make sure that he has that opportunity if he asks for it, even if he disagrees with your view of the appropriateness of the settlement.

Attorney General ASHCROFT. Thank you, Senator. As I have indicated, I will confer with our trial team about that.

Senator SESSIONS. And as I have looked at the matter, I think the case on Lindh was strong. I understand that good people can differ on the sentence, but I think the facts on the question of treason—and I suspect I will submit, since my time is up, as to why he was not charged with treason. It seems to me that you should charge the most serious offense provable, and the evidence, I would think, comes pretty strong to support that. But I would like to hear your view of it and would submit some questions in writing on that.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Mr. Attorney General, without going into the question of the sentence, I agree with the Senator from Alabama that under the victims legislation the widow does have a right to be heard, and appropriate family members. I understand the plea bargain is the plea bargain, and that is something that you have to make a decision on.

Apparently, according to press accounts, President Bush personally agreed to the plea bargain. I am not here to debate whether that was right or wrong, but I am saying I feel that the law does allow—I believe the Senator from Alabama is correct and, if you would, when you get back to him, if somebody could get back to me, too, if you agree with that interpretation.

The Senator from Washington State has been waiting here patiently all day, an extremely valuable member of this committee, and I would yield to her.

STATEMENT OF HON. MARIA CANTWELL, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman, and thank you, Attorney General Ashcroft, for being here today and giving the committee your time.

Obviously, Seattle and the Northwest have been in the news a lot lately on the issue of terrorism. We have had previous incidents of the Ressam case, laptops being found in caves in Afghanistan with photographs of Seattle on them, and a variety of things.

Do you think, from the information you have, that Seattle is home to a sleeper cell of terrorist activity?

Attorney General ASHCROFT. I would decline to comment on specific cities as being involved in any specific way. Let me just say this, that I believe there are substantial numbers of individuals in this country who endorse the Al Qaeda agenda—some individuals have specifically sworn participation in the agenda—and that the threat is one that should be taken seriously across the entire United States of America. So I would exempt no city.

As I observed the events of September 11 and as we reconstructed, we found that there was a presence across America of individuals, whether it be from San Diego or Phoenix or Oklahoma

City or Minneapolis or any number of locations, that might not appear to those of us who would say, now, where would you find a terrorist?

But the truth of the matter is that I think we have to have an alertness, and I would not devalue any of the items that you have mentioned in terms of an indication of whether people should be alert in one part of the country or another.

Senator CANTWELL. Do you have any specific information that has not been made public? I understand there may be reasons why it hasn't, but do you have any information that would suggest that Seattle is a target for terrorist activities?

Attorney General ASHCROFT. Well, I think the entire United States of America is a target for terrorist activities. Let me say, Senator, that in the event that you would like to speak with greater specificity than I can speak in this setting, I would be glad to share with you in a secure setting—I don't want to intimate in any respect by this offer that I have specific information regarding any city either in your jurisdiction or others, but overall I would be happy to find a way to be more forthcoming in a setting that would be more appropriate and more consistent with the national interest.

Senator CANTWELL. Well, as I have read the newspapers and watched the television, Seattle has once again come up as a target. I have looked at the various information about the U.S. citizen and for new Seattle resident James Ujaama, who is now being held. In looking at some of the numbers it became strikingly clear that we have about 60 agents in the Washington State area. For the surrounding States, we have about twice as many as that.

So I am going to be asking that you and the FBI look specifically at increasing the number of Federal agents and Federal prosecutors in that area. I'm also going to ask that you look at ways that the COPS program might be able to enhance the local law enforcement capability in my area. If, in fact, Seattle is going to process terrorism information quickly and process it through the system, we are going to need more help.

I don't know if you have any comments on that. I don't know if that has been made clear to you the deficit in FBI resources in the State that probably has developed over a number of years.

Attorney General ASHCROFT. The allocation of our law enforcement resources should always be the subject of review and our law enforcement resources need to be threat-related in terms of they ought to be deployed in accordance with threats.

In terms of those cities that are located in certain ways on the borders, we know from your remark that the interception of Ressam was in that area. Those cities that are ports of entry have exposure in other ways, so that when we balance the deployment of our law enforcement authorities we have to measure the risks and make those assessments. And we would be very happy to confer with you in that respect about the deployment of resources made by the Department.

Senator CANTWELL. Thank you. I appreciate that very much.

In the James Ujaama case, which I think represents the third U.S. citizen of interest, he is currentyly being held on a Federal witness warrant. The Department is interested in Ujaama's rela-

tionship to London Mosque leader Hamza al-Masri, and in his possible activities in the Northwest in setting up a terrorist training camp in Bly, Oregon.

Do you know how long you intend to hold Mr. Ujaama under that material witness warrant?

Attorney General ASHCROFT. Well, the material witness warrant process is one supervised by the courts and it is a program, a criminal justice procedure that provides variable time for holding and various other things that relate to court-supervised determinations. For me to comment on a specific case is simply inappropriate. We will pursue the national interest in respect to cases related to material witness warrants as well as others.

Senator CANTWELL. So would he be prosecuted in the Federal court system or not, or you haven't made that determination?

Attorney General ASHCROFT. Well, the material witness warrant is part of the grand jury system. It does not necessarily result in the prosecution of individuals. It is a program whereby individuals are held because they have information that could be important to the criminal justice proceedings.

So the fact that a person is being held as a material witness does not indicate that they are the target of, or that that person is the target of a specific criminal charge or might ever be. It is the fact that we believe information that the person has could be valuable to criminal justice proceedings, and the courts make a determination that that person should be subject to detention in order to make sure that that information is available when the court or the judicial process makes a decision.

Senator CANTWELL. So does that leave two paths available, then? I mean, he could be prosecuted under the Federal court system or as an armed combatent?

Attorney General ASHCROFT. He could only be prosecuted if he were to be in some way indicted or charged. And to be detained on a material witness warrant is not an indictment or a charge. It is merely the determination by the court that a person may be in possession of certain kinds of information that would be valuable in criminal justice proceedings against other individuals.

It does not mean that a person could never be charged, or could not in some way be charged either by other authorities such as State or local authorities that found other violations as a part of his or her behavior. But in and of itself, being detained as a material witness does not slate someone to be tried on any kind of criminal charge.

Senator CANTWELL. Are the British cooperating with us on the Hamza al-Masri case in getting enough evidence to—

Attorney General ASHCROFT. I believe that is fair to say——

Senator CANTWELL. That is why Mr. Ujaama is being held, is that right, his relationship to Hamza Al-Masri?

Attorney General ASHCROFT. I am not in a position to comment on specific cases. It would be inappropriate. I think it is fair to say that the British have been very cooperative with us. The international community has been cooperative, I think it is fair to say, beyond previous levels of cooperation in this entire event.

I have spent quite a bit of time with my international counterparts from around the world and the level of cooperation is increas-

ing and has been gratifying. Obviously, we have to respect the sovereignty and the laws of other nations when we ask them to cooperate. They can't violate their laws in so doing, but they have gone as far as they can in most cases to be very helpful to us.

Senator CANTWELL. I am going to add for the record some questions or comments about the northern border. Some of my colleagues have already talked about that, but obviously that is one of the reasons why I do think the Northwest may need or require more Federal agents and prosecutors.

Also, you have answered a lot of questions today about privacy. I asked FBI Director Mueller when he was before the committee some time ago whether he thought that we should consider a privacy officer within the FBI, something that may end up saving you and he a lot of time before this committee if we had such a post in looking at some of our policies internally.

I know that my time is expired. One thing that I did want to point out is the Osman case in Seattle. I know you can't talk about specifics of the case, but I was surprised to find out that Mr. Osman also suspected of terrorist activity—and I am just curious whether you would be surprised by this as well—Mr. Osman had been a Navy reservist. I think he is a Lebanese citizen who maybe falsified some immigration information, but I was surprised to hear that he had succeeded in becoming a Navy reservist in the Northwest.

Does that sound surprising or do you think that is something we should look into?

Attorney General ASHCROFT. Well, I think a variety of people have found themselves in a variety of settings nationally and there have been times when we were far less concerned about those kinds of things than we are today. That is why in my remarks I think we are thinking anew and acting anew, and some of those things will require us to change the way in which we do things.

Senator CANTWELL. Thank you, Mr. Attorney General. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Cantwell.

Senator Edwards?

Senator EDWARDS. Thank you.

Mr. Attorney General, I am going to read a quote from one of the recent legal briefs that you all filed. You said, "With respect to the military judgment to detain an individual as an enemy combatant in a time of war, a court's inquiry should come to an end once the military has shown in the return that it has determined that the detainee is an enemy combatant."

Is it your position that once the military decides to detain a U.S. citizen as an enemy combatant that that citizen has no right to make a case, to offer evidence, that he or she is an innocent, loyal citizen, and to make that case before an independent judge?

Attorney General ASHCROFT. My position is that the person has a right to a habeas corpus proceeding, but that the courts should give very high levels of deference to the President's determination that an individual detained as an enemy combatant is, in fact, detained as an enemy combatant.

My position is that the detention, not being a matter of the criminal justice system, that courts are ill-advised and ill-con-

structed to try and make judgments about prisoners of war as to whether prisoners of war are indeed—at what level or another, to second-guess, to try and ascertain is this prisoner of war a real prisoner of war, or that one, and to try and develop some basis.

In the Fourth Circuit, which is a matter which is already on appeal, we have argued a variety of points. And I could cite our brief there, but I believe that the determination of the President should be given the highest level of deference under the War Powers Act, and those who act in his behalf should be accorded that kind of deference.

Senator EDWARDS. Does that reasoning, Mr. Attorney General, apply—and I would point out that, of course, a habeas proceeding which you made reference to is about jurisdiction, not about evidence of innocence. Does that reasoning apply to U.S. citizens captured not only in a theater of combat in another country, but also folks who are captured here on U.S. soil?

Attorney General ASHCROFT. We believe that the law relating to the detention of enemy combatants is not changed based on the nationality of the person detained as an enemy combatant. We rely, of course, on the cases of the Supreme Court, particularly the *Quirin* case, which indicates that the President has the right to detain enemy combatants who are citizens of the United States in the same way that he would have the right to detain enemy combatants who are non-citizens.

Senator EDWARDS. I know that some concern has been expressed by you and others in the past about the danger to, for example, national security in having any kind of any open court proceeding. You know, of course, that there are procedures like the Classified Information Procedures Act, military courts, and other ways to deal with that.

Under the reasoning that you have just talked about, would it be possible for the Government to pick up me or you or anybody else in this room, label them an enemy combatant, put them in jail, keep them there, and in that case for none of us to ever get an opportunity to make the case that we are innocent and that we are not, in fact, an enemy combatant before some independent body, some judge?

Attorney General ASHCROFT. I think one of the most instructive cases in that respect would be *Ex Parte Milligan*, which was a case finalized in 1866. The Supreme Court held that non-belligerent citizens with no links to enemy forces may not be detained by the military, and I think that that is probably the best answer I can give you in that respect.

Senator EDWARDS. Mr. Attorney General, let me ask you—I don't mean to interrupt you. Were you finished? I am sorry.

Attorney General ASHCROFT. I am close enough to being finished. I hope I am finished soon.

[Laughter.]

Senator EDWARDS. I think I am the last one.

I am asking you whether you believe it is right, as the Attorney General of the United States, that anybody in this room could be picked up by——

Attorney General ASHCROFT. Absolutely not, no. I just don't think that people arbitrarily can be picked up and labeled. The determination has to be made.

Senator EDWARDS. OK, and do you believe that that person, whoever is picked up, should have an opportunity in some forum—you know, confidential, nobody else there, someplace—I mean, there are multiple choices of forums. I am not concerned about that, and I am certainly not concerned about it being done in an open court.

But should any one of us who is picked up and labeled as an enemy combatant at least get a chance to make a case to somebody other than the people who picked us up that we are, in fact, innocent and we are not an enemy combatant? That is what I am asking you, not about cases. I am asking what you think.

Attorney General ASHCROFT. Well, I can't divorce myself completely from cases. It is my responsibility to represent the United States of America in this setting. We are doing so in a matter which is currently being litigated in the Fourth Circuit.

While we concede that a habeas proceeding can be appropriate, we believe that very substantial deference needs to be given to the President of the United States in his exercise of the war powers and his Commander-in-Chief responsibility, and that that is an appropriate thing for the President to do when the Nation is at risk.

Senator EDWARDS. Well, you mentioned cases and I think you specifically mentioned the Fourth Circuit. I believe that the Fourth Circuit recently declined to dismiss a case because they weren't ready to accept, if I understand the case correctly, your view, and I am quoting now from the case, "with no meaningful judicial review any American citizen alleged to be an enemy combatant may be detained indefinitely without charges or counsel on the Government's say-so." So I think there is actually some law to the contrary about this.

But since I don't have much time, let me move on quickly to one last subject, the right to counsel. You have taken the position that there is no right under the laws and customs of war for an enemy combatant to meet with counsel concerning his detention.

Is one of the concerns of allowing such a person—and I have asked you about whether they ought to be able to make their case that they are, in fact, innocent. Now, I am asking you whether they ought to at least be able to talk to a lawyer.

Is one of the concerns about them being able to at least have a conversation with a lawyer that that might be a way for them to pass information to the outside world if, in fact, they are hostile to the United States?

Attorney General ASHCROFT. There is no question about the fact that people who are enemies of the United States sometimes seek to use unconventional means to communicate regarding plots and other things. We have other cases that are directly on point to that that relate to people held in the criminal justice system.

Now, what you are making reference to, I believe, are prisoners of war, not people in the criminal justice system.

Senator EDWARDS. I am talking about enemy combatants specifically.

Attorney General ASHCROFT. Frankly, even under the Third Geneva Convention, which does not afford protections to unlawful

enemy combatants, no prisoners of war have the right of access to counsel to challenge their detention. The only time even the Geneva Conventions provide a right to counsel is for POWs that are charged with crimes, and people just held as enemy combatants are not in that category.

Senator EDWARDS. Of course, besides international law, there is the issue of what we require and what we believe in here in this country.

Let me ask you this. There are, of course, I think you would recognize, men and women in the military who are capable, competent lawyers, whose service to their country is beyond dispute. There are lawyers within the Government who have the highest level of clearance to keep, receive, and maintain classified secrets of the United States.

Would you be willing to let those lawyers, about whom there is absolutely no question about both their loyalty to the United States and that they would protect any information, because they have a long, clearly established record of having done it—would you be willing to let those lawyers talk to people who have been detained, imprisoned, as enemy combatants?

Attorney General ASHCROFT. I don't believe it is in the national interest of the United States to provide military lawyers from our army to confer with enemy combatants who have been detained as prisoners.

Senator EDWARDS. And would you say the same thing about other lawyers who have been cleared, have had high-level, classified clearing, so that there is no question about their own integrity and their own willingness and history of maintaining classified information?

Attorney General ASHCROFT. I do not view this as a matter of challenging the integrity of the lawyers. That is not our concern here. The establishment of a right for prisoners of war to be given access to counsel is fraught with a number of difficulties and I am not prepared to endorse that proposal at this time.

Senator EDWARDS. Well, let me just say this because I know we need to finish this hearing. I don't think any of us have any doubt that some of the people that are involved in this category of being classified as an enemy combatant are despicable, and based on what I know they belong in prison. But the fact that somebody is despicable, the fact that we believe—you, me, anybody in this room believes they belong in prison is not enough, under the tradition and history of this country, to imprison them forever without them ever having a hearing, without them ever being able to talk to a lawyer.

So I think those kinds of issues go to the very values that we believe in as a Nation. And I don't think it just protects them, and I can see why some people would believe they don't deserve protection, but I think it protects all of us to make sure innocent people don't go to jail.

It also makes sure, by the way, that other countries take our legal system seriously and don't believe that they can imprison U.S. citizens in their countries and then say, well, look, they are doing the same thing to their own citizens in the United States.

So those are my concerns. I believe that based on everything I read that the people I am aware of being detained belong where they are. My concern is over the long term I think it is important for us as a Nation to send the right signals both to our own people on what our values and beliefs are and to other nations on what we stand for as a country.

I appreciate your answering my questions.

Attorney General ASHCROFT. Thank you.

Chairman LEAHY. On that point, Mr. Attorney General, I know we have an American citizen by the name of Hamdi who is being held. Your Department has said in a legal brief that he has neither a right to counsel nor a right to habeas corpus, or even to see an attorney.

I would ask when you are having some of this information if you could have somebody brief me on just what that is and the involvement, because I agree with what Senator Edwards has said. I am always concerned in our attempt to protect ourselves that we don't protect ourselves if we trample too much on individual rights. All of us fear the idea that if we get arrested for something and we are totally innocent, we want at least a chance to get that word out.

But, second, of course, we have to deal with a whole lot of other countries, and we have always been able to hold ourselves up to a very high level of the rule of law and we don't want to give them an excuse, if they are holding American citizens, to say we are doing nothing different than you.

We are about to pass the most important corporate reform legislation in decades this week. They had the committee of conference last night and the Sarbanes-Oxley accounting part and the Leahy-McCain criminal law part passed.

I had written both the White House and the Department of Justice to see if they had any position one way or the other on the legislation, and they did not. I wanted to see if they had formally expressed support for the Sarbanes or the Leahy bill. They did not, so we went forward without administration involvement, although the President is now looking forward to signing the legislation as soon as we pass it. So that is going to pass without the input from the administration.

But we do have one reform bill here, and Director Mueller has been working hard to reorganize the FBI and we have had hearings in this committee. Based on these hearings, this committee, Republicans and Democrats together, unanimously passed the Leahy-Grassley FBI Reform Act, strengthening FBI oversight, security, and management. It is on the floor of the Senate now. There is a Republican hold on this reform bill.

I would ask again if the Department of Justice could let us know if you have a position on this bill that has passed unanimously from here and will you work with us to give Director Mueller the tools he needs?

Attorney General ASHCROFT. We will be happy to consider the measure and to confer with you about it.

Chairman LEAHY. Please do that because we have been trying to get input. I realize it is too late to get input from the administration and the Department of Justice on the legislation that Senator

Sarbanes, Congressman Oxley, and I and others have passed, but I would like it on this.

For example, should the FBI's new analysts that they are getting be transferred over to the Homeland Security Department? Do you have any feeling on that?

Attorney General ASHCROFT. I believe the FBI needs to have an analysis section in the FBI. It is very important that they have the ability to——

Chairman LEAHY. Well, we all agree with that, but should they be put over into Homeland Security?

Attorney General ASHCROFT. I don't think so. I believe that it is important to have the investigative and analytic responsibilities of the FBI in the Justice Department, where we also have a group of individuals, very talented and energetic, that are charged with respecting the rights of individuals.

So I think it is healthy to have the defense of the civil rights of individuals in the same department as the investigative and intelligence arm, because I believe it provides a counter-weight and balance, much of which we have talked about today, that is healthy.

When we talk about security and we say that there is a tradeoff between security and liberty, sometimes I think we misstate the issue. I believe what we are securing is liberty, and if what we are securing is liberty, there has to be that serious attention to the freedoms involved and I want to give that in every respect.

Chairman LEAHY. I think Benjamin Franklin was the one who had it right when he said, in effect, if people give up their liberty for security, they deserve neither. I want us to have both.

Senator Durbin was coming back, but he is managing a bill on the floor. So, without objection, his and the other Senators' questions can be submitted for the record.

Attorney General Ashcroft, it is always good to have you here. Thank you for coming by.

[The prepared statement of Attorney General Ashcroft appears as a submission for the record.]

Chairman LEAHY. We stand adjourned.

[Whereupon, at 1:19 p.m., the committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 23 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to written questions to the Attorney General at the hearing before the Committee on the Judiciary entitled "Oversight Hearing of the Department of Justice" on July 25, 2002. We are providing responses to questions 14, 15, 31, 32, 33 and 34, all of which relate to the implementation of the USA PATRIOT Act, the changes the Act made to provisions of the Foreign Intelligence Surveillance Act (FISA), and the FISA process itself. The Department is continuing to gather information to answer the remaining questions posed to the Attorney General and we will forward those responses as soon as possible.

Please note that the response to question 14(b) requires the Department to provide information that is classified at the SECRET level. That classified information is being delivered to the Committee under separate cover and under the longstanding Executive branch practices on the sharing of operational intelligence information with Congress.

We appreciate your oversight interest in the Department's activities pursuant to the USA PATRIOT Act. We look forward to continuing to work with the Committee as the Department implements these important new tools for law enforcement in the fight against terrorism. If we can be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

Enclosure

cc: The Honorable Orrin G. Hatch
Ranking Minority Member

Written Questions of Senator Patrick Leahy
Chairman of the Senate Judiciary Committee
to the Honorable John Ashcroft
At the Hearing Before the Senate Judiciary Committee
"Oversight Hearing on the Department of Justice"
July 25, 2002

USA PATRIOT Act and Libraries

14. The Committee has learned of growing concern among professional librarians that the USA PATRIOT Act is leading to a greater number of federal law enforcement demands for records of the use of library services, as well as orders to librarians to keep those requests secret. There is confusion over whether the orders allow the librarians to disclose the fact of a request, without disclosing any substance such as the name of the person involved. It is also not clear whether these secrecy orders are being issued for general law enforcement purposes beyond the scope of the Foreign Intelligence Surveillance Act.

(A) Please clarify what the Department is doing to impose secrecy on its demands for information from libraries.

A Court order issued pursuant to section 1861 of FISA (amended by section 215 of the USA PATRIOT Act) to compel the production of certain defined categories of business records would contain language which prohibits officers, employees or agents of companies or institutions receiving such an order from disclosing to the target or to persons outside the company or institution the fact that the FBI has sought or obtained access to those defined categories of business records.

An FBI National Security Letter served upon an establishment, such as a library, for the purpose of obtaining electronic communications transactional records, contains language invoking Title 18, United States Code, Section 2709(c), which prohibits any officer, employee, or agent of the establishment from disclosing to any person that the FBI has sought or obtained access to that information or records.

(B) How many demands for library information has the Department made since enactment of the USA PATRIOT Act, as well as the legal authority that was used to require secrecy?

Section 215 of the USA PATRIOT Act amended the business records authority found in Title V of the Foreign Intelligence Surveillance Act (FISA). This authority can be used to obtain certain types of records from libraries that relate to FBI foreign intelligence investigations. Under the old language, the Foreign Intelligence Surveillance Court (FISC) would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. The USA PATRIOT Act changed the standard to simple relevance

and gives the FISC the authority to compel production in relation to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

The classified semi-annual report discussing the use of sections 1861-1863 of FISA for the period June 30, 2001 through December 31, 2001 was provided to the Intelligence and Judiciary committees of both houses of Congress on April 29, 2002. That report was provided under cover letter to each committee chairman. Although not specified in the statute, the Department's practice has been to submit the reports covering January1 through June 30 of a given year, by the end of December of that year. The Department of Justice is currently preparing the semi-annual report covering the period January 1, 2002 through June 30, 2002.

The Department is able at this time to provide information pertaining to the implementation of section 215 of the USA PATRIOT Act from January 1, 2002 to the present (December 23, 2002). That information is classified at the SECRET level and, accordingly, is being delivered to the Committee under separate cover.

(C) How many libraries has the FBI visited (as opposed to presented with court orders) since passage of USA Patriot Act?

Information has been sought from libraries on a voluntary basis and under traditional law enforcement authorities not related to the Foreign Intelligence Surveillance Act or the changes brought about by the USA PATRIOT Act. While the FBI does not maintain statistics on the number of libraries visited by FBI Agents in the course of its investigations, an informal survey conducted by the FBI indicated that field offices had sought information from libraries. For example, various offices followed up on leads concerning e-mail and Internet use information about specific hijackers from computers in public libraries.

(D) Is the decision to engage in such surveillance subject to any determination that the surveillance is essential to gather evidence on a suspect which the Attorney General has reason to believe may be engaged in terrorism-related activities and that it could not be obtained through any other means?

The authority to compel the production of business records from libraries does not permit any type of "surveillance." Under the Foreign Intelligence Surveillance Act (FISA), electronic surveillance authority is permissible upon a showing of probable cause that the target of the surveillance is a foreign power or an agent of a foreign power and each of the facilities or places at which the surveillance is being directed is being used or is about to be used by a foreign power or an agent of a foreign power.

As stated above, section 215 of the USA PATRIOT Act amended the business records authority found in Title V of FISA. This authority can be used for obtaining certain types of records from libraries that relate to FBI foreign intelligence

investigations. Under the old language, the FISC would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. The PATRIOT Act changed the standard to simple relevance and gives the FISC the authority to compel production in relation to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

15. Sec. 215 of the Act expands the range of records that can be requested from a library or educational institution to include "business records" which may include information about individuals beyond the target of an investigation. What precautions is the Attorney General taking to isolate out only those records related to a specific target? How is the Attorney General ensuring the security and confidentiality of the records of others? How promptly have those records been returned to the institutions from which they were obtained?

The current standard for obtaining business records is "relevance" but it requires more than just the Special Agent's belief that the records may be related to an ongoing investigation. Use of this technique is authorized only in full investigations properly opened in accordance with the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (FCIG). The FISA business records authority stipulates that no investigation of a U.S. person may be conducted solely on the basis of activities protected by the First Amendment to the Constitution. The FISA Court will not order the production of business records unless it can be shown that the individual for whom the records are being sought is related to an authorized investigation.

The security and confidentiality of records is guaranteed by the FISA law which prohibits officers, employees or agents of companies or institutions receiving orders from disclosing to the target or to persons outside the company or institution the fact that the FBI has sought or obtained access to information or records. The FBI obtains copies, not originals, of records from companies and institutions. Thus, there is no need to return records.

FBI Headquarters has charged field offices with the responsibility for establishing and enforcing appropriate review and approval processes for use of these expanded authorities. Compliance with these and other requirements is monitored through inspections and audits conducted by the FBI Inspection Division, the Intelligence Oversight Board, and the Department's Office of Intelligence Policy and Review.

FISA Process

31. The Committee is examining the Justice Department's FBI's performance before the 9/11 attacks, and especially at the decision of FBI Headquarters officials to reject the request from the Minneapolis field office for a FISA search order in the Moussaoui case. FBI Agent Coleen Rowley has alleged that FBI Headquarters officials are too cautious because Justice Department has a policy of never losing a case before the FISA Court. Is that the Attorney General's policy, or does he expect Department attorneys to make their best judgements on the facts and law in each case?

The Justice Department is appropriately aggressive in bringing applications before the Foreign Intelligence Surveillance Court and does not have a policy of never losing a case before the Court. Each application presented to the Court contains an affidavit of the investigating agent that attests to the facts of the case. A certification from the appropriate intelligence agency official is also attached. Before the case goes to Court, the Attorney General personally approves the application. In the cases presented before the Court, the judges ask questions, probe, and frequently demand additional information. Applications are revised as a result of this process, and some have been withdrawn and resubmitted with additional information.

OLC Opinion: FISA

32. In the Attorney General's testimony before the Judiciary Committee, he referred to an Office of Legal Counsel memorandum or opinion relating to FISA issues and the 'agent of a foreign power' requirement. Please provide a copy of any such memorandum of opinion to the Committee.

The Office of Legal Counsel memorandum referred to in the question constitutes confidential legal advice to the Office of the Deputy Attorney General. However, the Department's position and reasoning concerning these issues was set forth at length in a letter to the Chairman and Vice-Chairman of the Senate Select Committee on Intelligence, dated July 31, 2002, in connection with hearings held by that Committee on that day on S. 2586. A copy of that letter is provided herewith.

USA PATRIOT ACT

33. The Committee is looking into reports that FBI Headquarters supervisors were "chilled" and became more cautious in forwarding FISA application to the Justice Department and to the FISA Court ("FISC") during 2000 and 2001, before the 9/11 attacks, because the FISA Court (FISC) barred certain FBI supervisory special agents from appearing before it.

(A) How many FBI personnel were barred by the FISC from appearing before it?

One FBI supervisory special agent has been barred from appearing before the Court. In March of 2001, the government informed the Court of an error contained in a series of FISA applications. This error arose in the description of a "wall" procedure. The Presiding Judge of the Court at the time, Royce Lamberth, wrote to the Attorney General expressing concern over this error and barred one specifically-named FBI agent from appearing before the Court as a FISA affiant.

(B) When did the FISC take these actions?

This action was taken by then-Presiding Judge Lamberth on March 9, 2001.

(C) How did the FISC communicate these actions to the Justice Department or to the FBI?

Then-Presiding Judge Lamberth communicated this action to the Justice Department in a Memorandum to the Attorney General dated March 9, 2001.

(D) What actions, if any, did the Justice Department take in response to the communications from the FISC barring certain FBI supervisory agents from appearing before the FISC?

Following receipt of the letter, FBI Director Freeh personally met twice with then-Presiding Judge Lamberth to discuss the accuracy problems and necessary solutions. The FBI refined a set of interim procedures that it had developed in November 2000. On April 6, 2001, the FBI disseminated to all field divisions and relevant headquarters divisions a set of new mandatory procedures to be applied to all FISAs within the FBI. These procedures, known as the "Woods procedures," are designed to help minimize errors in and ensure that the information provided to the Court is accurate. The procedures were briefed to the full FISA Court in May 2001. They have been declassified at the request of your Committee.

On May 18, 2001, the Attorney General issued a memorandum setting forth FISA policy, including mandated "direct contact" between FBI field offices and DOJ's Office of Intelligence Policy and Review, streamlined FISA pleadings, additional training, and a study of electronic connectivity between the Department of Justice and the FBI.

The matters involving accuracy in FISA pleadings were also referred to the Department's Office of Professional Responsibility for a thorough investigation. That investigation is pending.

(E) Please provide the Committee with any memoranda or communications between or relating to the FISC's actions barring certain FBI supervisory agents from appearing before the FISC?

We are aware of the FISC action barring only one FBI supervisory agent from appearing before the Court, based upon the Court's Memorandum to the Attorney General in March 2001. We will confer with the Court about the provision of this Memorandum, which is classified at the SECRET level, to the Committee. We can advise you, however, that the document reports the Court's concern that the FBI's previous corrective action had been ineffective in solving the problem of inaccurate information in FBI affidavits. The Memorandum further advises that the Office of Intelligence Policy and Review (OIPR) must conduct an inquiry regarding this matter. OIPR referred the matter to the Department's Office of Professional Responsibility, which is conducting an investigation and drafting a report concerning the conduct that was the basis of the Court's Memorandum.

After receipt of the Court's Memorandum to the Attorney General, OIPR prepared initial fact-finding documentation relevant to OPR's investigation. That documentation was turned over to the FISC and to OPR when the matter was referred there. We will advise when the Department's action on this matter is completed.

34. There are also reports that FISC has not yet implemented the USA PATRIOT Act, which amended FISA to authorize orders if "a significant purpose" is to collect foreign intelligence and to authorize FISA coordination with law enforcement against terrorist and spies. What are the Justice Departments views on this issue? Does the Attorney General think FISC's action had a "chilling" effect of the FBI?

The FISC's May 17, 2002 Order approved in part and disapproved in part the Department's new Intelligence Sharing Procedures. On November 18, 2002, the Foreign Intelligence Surveillance Court of Review rejected the FISC's analysis and approved in full the March 2002 Intelligence Sharing procedures.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 17 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the Department's second submission responding to written questions posed to the Attorney General at the hearing before the Committee on the Judiciary entitled "Oversight Hearing of the Department of Justice" on July 25, 2002.

On December 23, 2002, the Department provided responses to questions number 14, 15, 31, 32, 33 and 34, all of which related to the implementation of the USA PATRIOT Act, the changes the Act made to provisions of the Foreign Intelligence Surveillance Act (FISA), and the FISA process itself. In addition, in response Senator Leahy's questions number 44 through 93, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002, and August 26, 2002.

We are currently finalizing the remaining questions posed by the Committee, and will forward those responses to you as soon as possible. If we can be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Written Questions of Senator Patrick Leahy
Chairman of the Senate Judiciary Committee
to the Honorable John Ashcroft
At the Hearing Before the Senate Judiciary Committee
Oversight Hearing on the Department of Justice
JULY 25, 2002

Operation TIPS

** As you are aware, pursuant to Section 880 of the Homeland Security Act of 2002 (P.L. 107-296), the Justice Department is not moving forward with the Operation TIPS program.*

Leahy 1. **Operation TIPS is described on the government web site as *"a national system for concerned workers to report suspicious activity."* The description of the program has changed on the web site. For example before July 25, the first line of the description read: *"Operation TIPS - the Terrorism Information and Prevention System - will be a nationwide program giving millions of American truckers, letter carriers, train conductors, ship captains, utility employees, and others a formal way to report suspicious terrorist activity."* On July 25, the first line of the description read: "*Operation TIPS, administered by the U.S. Department of Justice and developed in partnership with several other federal agencies, is one of the five component programs of Citizen Corps.*" Unlike the earlier version, the later version does not describe the professions or industries of the targeted TIPS "workers."**

(A) Please provide the Committee with each version of the web page description of the Operation TIPS program and the date that each version posted.

Answer: On January 30, 2002, the date of the President's State of the Union address, the USA Freedom Corps Policy book was made available on the www.usafreedomcorps.gov Website. This policy book included the following language related to Operation TIPS:

> *Operation TIPS: Terrorist Information and Prevention System: Operation TIPS will be a nationwide mechanism for reporting suspicious activity—enlisting millions of American transportation workers, truckers, letter carriers, train conductors, ship captains, and utility employees in the effort to prevent terrorism and crime. Operation TIPS, a project of the U.S. Department of Justice, will be initiated as a pilot program in ten cities in America. DOJ will establish a 1-800-Hotline for participants in Operation TIPS to report information. The Administration has requested $8 million in Fiscal Year 2003.*

Also, in another section of that document was the following initial program description:

Create Operation TIPS: Terrorist Information and Prevention System

As part of the Citizen Corps, Operation TIPS—the Terrorist Information and Prevention System—will be a nationwide mechanism for reporting suspicious terrorist activity—enlisting millions of American transportation workers, truckers, letter carriers, train conductors, ship captains, and utility employees. Operation TIPS, a project of the U.S. Department of Justice, will start first as a pilot program in ten cities in America, affecting more than 1 million workers. Applications from cities will be accepted in Fall 2002 for inclusion as one of the pilot programs.

Operation TIPS will establish a national reporting system that would allow these workers, who have routines and are well-positioned to recognize unusual events, to report suspicious activity to the appropriate authorities. Every participant in this new program will be given a Citizen Corps: Operation TIPS information sticker that could be affixed to the cab of the vehicle or placed in some other public location so that the toll-free reporting number would be readily available to report any suspicious activity.

Everywhere in America a concerned worker will be able to call the 1-800-Hotline that can route calls immediately to law enforcement or a responder organization when appropriate. Importantly, this number will not supplant the existing 911 emergency system. Instead, it will take the stress off the already burdened local systems needed for emergencies. The U.S. Department of Justice will provide $2 million in Fiscal Year 2003 to establish the hotline and assist with training and $6 million for the pilot programs and outreach materials.

Operation TIPS builds on the success of programs such as Highway Watch, which is a crime prevention partnership among the American Trucking Association and six states, and security training at the Global Maritime and Transportation School, which includes enhancing the ability of mariners aboard American vessels in inland waterways and the Great Lakes to track and record potential threats.

On April 5, 2002, a revised program description was posted on the www.citizencorps.gov Website. It contained a list of workers whose jobs fit the criteria of having regular routines in public areas and on public thoroughfares. This list was provided to help explain the types of workers that might be included and was not intended as a final or definitive list. The language was as follows:

***Operation TIPS**, administered by the U.S. Department of Justice and developed in partnership with several other federal agencies, is one of the five component programs of the Citizen Corps.*

Operation TIPS will be a national system for reporting suspicious, and potentially terrorist-related activity. The program will involve the millions of American workers who, in the daily course of their work, are in a unique position to serve as extra eyes and ears for law enforcement. Workers, such as truck drivers, bus drivers, train conductors, mail carriers, utility readers, ship captains, and port personnel are ideally suited to help in the anti-terrorism effort because their routines allow them to recognize unusual events.

Participants in Operation TIPS will be given an Operation TIPS information decal that includes the toll-free reporting number. That decal can be affixed to the cab of their vehicle or placed in another location where it is readily available. The toll-free hotline will route calls received to the proper local, state, or federal law enforcement agency or other responder organizations.

Operation TIPS is scheduled to be launched in Summer 2002 as a pilot program in ten cities. The program will give workers from selected industries a formal way to report suspicious and potentially terrorist-related activity through a single and coordinated toll-free number. The National Crime Prevention Council, in partnership with the Justice Department, will develop educational and training materials for the industries that will participate in Operation TIPS.

On July 17, 2002, the following updated program description was made available on the Citizen Corps Website:

***Operation TIPS**, administered by the U.S. Department of Justice and developed in partnership with several other federal agencies, is one of the five component programs of the Citizen Corps. Operation TIPS will be a national system for reporting suspicious, and potentially terrorist-related activity. The program will involve the millions of American workers who, in the daily course of their work, are in a unique position to see potentially unusual or suspicious activity in public places.*

The Department of Justice is discussing participation with several industry groups whose workers are ideally suited to help in the anti-terrorism effort because their routines allow them to recognize unusual events and have expressed a desire for a mechanism to report these events to authorities.

These workers will use their common sense and knowledge of their work environment to identify suspicious or unusual activity. This program offers a way for these workers to report what they see in public areas and along transportation routes.

All it will take to volunteer is a telephone or access to the Internet as tips can be reported on the toll-free hotline or online. Information received will be entered into the national database and referred electronically to a point of contact in each state as appropriate. This is not a national 911 center, and callers are expected to dial 911 for emergency local response.

Industries that are interested in participating in this program will be given printed guidance material, flyers and brochures, about the program and how to contact the Operation TIPS reporting center. This information can be distributed to workers or posted in common work areas. Operation TIPS is scheduled to be launched in late summer or early fall 2002. The goal of the program is to establish a reliable and comprehensive national system for reporting suspicious, and potentially terrorist-related, activity. By establishing one central reporting center, information from several different industries can be maintained in a single database. Operation TIPS will be phased in across the country to enable the system to build its capacity to receive an increasing volume of tips.

On July 24, 2002, the following changes were made in the above-indicated July 17, 2002, language:

In the 4th paragraph, the sentence: *"Information received will be entered into the national database and referred electronically to a point of contact in each state as appropriate"* was changed to:*"Information received will be referred electronically to a point of contact in each state as appropriate."*

In the last paragraph: *"By establishing one central reporting center, information from several different industries can be maintained in a single database"* was deleted.

On August 13, 2002, the following fact sheet [see attached Operation TIPS Fact Sheet] that had been sent to Congress and released to the public on August 9, 2002, replaced the program description on the Citizen Corps Website.

(B) Why were the changes made in the July 25 version of the Operation TIPS description?

Answer: Information on the Website from January 2002 until July 2002 reflected the initial program proposal and preceded full program development. The information was meant to provide general guidance on the purpose and design of the program until the program was ready to be launched in late summer/early fall. Because the Department of Justice (DOJ) and its partners were initially engaged in developing and launching other Citizen Corps initiatives (Neighborhood Watch and Volunteers in Police Service) that were announced in March and late May, respectively, development of the Operation TIPS concept did not begin in earnest until May 2002.

Early in May, it was determined that the "pilot cities" approach should be replaced with a nationwide, but still industry-specific approach. In addition, because there had recently been criticism directed at law enforcement for a failure to "connect the dots," or identify similar suspicious activities occurring in multiple locations around the country, it was suggested that a database be created from the calls coming into the hotline for that purpose. This information was added to the Web page in July.

On July 15, 2002, DOJ and the USA Freedom Corps office started receiving a large number of inquiries about the program. Prior to that date, there had been few inquiries, and they had been of a very general nature. Even though the program development was not complete, and DOJ and the Office of Homeland Security (OHS) were in various stages of discussions with industry groups, we felt it was important to provide a progress report on the program design.

Information on the Website was posted on July 17, 2002, to clarify that: 1) none of the industries had been finalized as participants; 2) TIPS would be a national system instead of a pilot program as previously proposed; and 3) DOJ would not be providing training and educational materials to the industry groups. These decisions were made during program development after meeting with different industry groups and federal agencies. Industries indicated that TIPS would be difficult to implement in pilot cities because workers, e.g. truckers, ship captains, did not easily fit into a pilot city model. Also, it was determined that training as to what constitutes suspicious activity was unnecessary because workers in the selected industries already recognize what is unusual and what is suspicious along their routes.

Additional changes were made to the information as it related to the database and status of the industry selection after the Attorney General was briefed on the current status of the program on July 24. Upon his review, he decided that a database would not be necessary for this program to operate effectively and that the system should be a simple hotline and referral system. He also decided that TIPS would not include workers, including postal and utility workers, whose routines take them onto private property. Changes were made to the Citizen Corps Website on July 25, 2002, to reflect these decisions.

(C) The version before July 25 states that the program *"involving 1 million workers in the pilot stage, will be a national reporting system that allows these workers, whose routines make them well-positioned to recognize unusual events, to report suspicious activity."* By contrast, the July 25 version states that, *"the program will involve the millions of American workers who, in the daily course of their work, are in a unique position to see potentially unusual or suspicious activity in public places."* Will reports from TIPS informants be limited to only activity occurring in "public places"? Will TIPS informants be instructed to make reports only on activity occurring in "public places"?

Answer: It was always the intention of the proposed hotline program that reports from TIPS volunteers would be limited to activity occurring in public places. Workers from participating industry groups would have reported suspicious, "publicly observable activity" and "potentially terrorist-related activities occurring in public areas."

Participating industries would have received information about the program explaining that the hotline was for reporting suspicious and "potentially terrorist-related activities occurring in public areas." Workers in these industries would have been instructed that they could have called the hotline number if they saw such public activity that caused them concern. In addition, the industries to which DOJ would have provided the TIPS hotline work only in public areas, not around neighborhoods and homes.

(D) The version before July 25 states that, *"Operation TIPS, a project of the U.S. Department of Justice, will begin as a pilot program in 10 cities that will be selected."* The July 25 version states that, *"Operation TIPS will be phased in across the country to enable the system to build its capacity to receive an increasing volume of tips."* Please describe how the program will be "phased in" and whether the plan to begin a pilot program in 10 cities has changed. Please identify the cities in which the TIPS program will be implemented in its initial phases.

Answer: The "pilot city" approach was changed to a nationwide approach for two main reasons. First, during program development when meeting with different industry groups and federal agencies, it was determined that a pilot city program design would not make the most sense for TIPS. Industries indicated that such a design would be unworkable because the industry workers (e.g. truckers, ship captains) did not easily fit into that model. Truckers, for example, often have routes that cross several states, and it would have been impossible to select ten pilot cities that fit every route.

Another reason for the change in approach related to a change in how the hotline would have been operated. At the outset, DOJ was in discussions with the National Response Center (NRC) to serve as the call center for TIPS. However, during program development, it was determined that the National White Collar Crime Center (NW3C) could provide a more cost-effective and efficient system for several reasons. One reason was that NW3C has the existing infrastructure on which a reporting system could have been established nationwide. The NRC did not have the capacity to receive calls from across the country and would have required considerable additional funding to do so. In addition, NW3C has the capacity to receive reports via email as well as telephone. Finally, NW3C also has the existing ability to simultaneously disseminate information to federal, state, and local law enforcement agencies throughout the country, and it was a priority for the DOJ to ensure that the information reached agencies at all three levels promptly. Therefore, the decision to work with NW3C allowed for a nationwide approach that had not previously been an option.

The term "phased in" merely related to an ongoing process to work with each state to determine which law enforcement agencies should receive the information that the call center would have disseminated. As states identified their point(s) of contact, which could have been a single point or multiple points of contact, they would have been added to the system to start receiving referrals.

Leahy 2. **The July 25 version states that, "*The Department of Justice is discussing participation with several industry groups whose workers are ideally suited to help in the anti-terrorism effort . . . .*"**

(A) Are "American truckers, letter carriers, train conductors, ship captains, utility employees, and others" among the "workers" covered in this description?

Answer: Of those groups, only truckers, train conductors, and ship captains would have been provided information about TIPS. It was decided that, despite the fact that DOJ and OHS never intended that any workers with access to private property be involved in the program, neither letter carriers nor utility workers would be invited to participate, due to expressions of concern from the public about the potential for privacy intrusions by members of those industries.

(B) If the answer to 2(A) is yes, please specify the "other" industries and workers with which or whom the Justice Department is discussing or plans to discuss participation.

Answer: It was the intention of DOJ to provide access to the hotline only to trucking, maritime,

shipping, and mass transit industries.

(C) If the answer to 2(A) is no, please detail which industries and workers with which or whom the Justice Department is discussing or plans to discuss participation in the TIPS program.

Answer: See answer to 2(B) and 2(C).

(D) Is the Department of Justice discussing the participation of librarians in the Operation TIPS or does it have any plans to do so?

Answer: DOJ did not discuss the participation of librarians in Operation TIPS, had no such plans, and had never entertained such a concept.

(E) Is the Department of Justice discussing the participation of health care professionals in the Operation TIPS or does it have any plans to do so?

Answer: DOJ did not discuss the participation of health care professionals in Operation TIPS, had no such plans, and had never entertained such a concept.

(F) Is the Department of Justice discussing the participation of teachers or educational professionals in the Operation TIPS or does it have any plans to do so?

Answer: DOJ did not discuss the participation of teachers or educational professionals in Operation TIPS, had no such plans, and had never entertained such a concept.

Leahy 3. Operation TIPS is being implemented and will be administered by the Department of Justice.

(A) How many Justice Department employees are currently working to implement the Operation TIPS program?

Answer: There was a DOJ liaison on temporary detail to the USA Freedom Corps office who was responsible on a full-time basis for the development and implementation of all three DOJ Citizen Corps initiatives. A program manager at the Bureau of Justice Assistance (BJA) had assisted with the design in order to be prepared to participate in implementation at a later date. In addition, staff in relevant DOJ components, e.g. the Office of Congressional and Public Affairs and the Office of Budget and Management Services within the Office of Justice Programs, the

Office of Legislative Affairs, Office of Public Affairs, Office of Intergovernmental and Public Liaison, and the Federal Bureau of Investigation, also provided support as necessary. This responsibility was only a minor aspect of the workload of all individuals other than the full-time liaison to the USA Freedom Corps office. All staff who worked on this initiative were already working for DOJ when the initial plan for this program was first announced.

(B) How many Justice Department employees does the Attorney General expect and plan will be necessary to administer the Operation TIPS program?

Answer: There would have been one program manager at BJA, within the Office of Justice Programs, to monitor the work of the two grantees, NW3C and National Crime Prevention Council (NCPC), who would have been tasked with responsibility for the program. These grants would have been part of that program manager's grant portfolio, and they would have been monitored in compliance with current grant management policies and procedures. NW3C would have operated the call center, and NCPC would have been responsible for the development and dissemination of information on how to access the hotline, instructions about its intended uses, and guidelines for volunteers on respecting privacy rights and restrictions on performing any law enforcement function. Input and assistance from other DOJ components, e.g. the Office of Budget and Management Services (OBMS) and the Office of the Comptroller (OC), would have been provided as necessary to provide the grant management infrastructure and ensure that accountability was included in the program design.

(C) Which component or office of the Justice Department will have responsibility for implementing and/or administering the Operation TIPS program?

Answer: See response to 3(B).

(D) What is the budget for the Operation TIPS program?

Answer: OJP was able to make $4.2 million available from existing resources within Byrne Discretionary funds to initiate the three DOJ Citizen Corps programs. Of those funds, $1.6 million was set aside to divide between NW3C and NCPC to establish the reporting system and to prepare and print flyers, brochures, or other materials necessary to provide information about the hotline to volunteers. Grants were not awarded to NW3C or NCPC for Operation TIPS.

The President's FY'03 budget included a request for $15 million to support the Citizen Corps programs for which DOJ is responsible. This amount was based on estimates of operating the three programs as initially designed. Approximately $6 million of this amount would have been targeted toward the maintenance of the call center and production and dissemination of

related materials.

(E) Will the Justice Department's work on the Operation TIPS program require reprogramming authorization?

Answer: DOJ would not have required reprogramming authorization to implement Operation TIPS.

(F) What is the statutory authorization for this program and its funding?

Answer: There was no specific authorization for this program or its funding; however, the program fit well within the bounds of the allowable uses of the Byrne Discretionary funds. As a result of Section 880 of the Homeland Security Act of 2002, DOJ now is not able to implement the Operation TIPS program.

Leahy 4. The Attorney General testified that he had recommended that the tips obtained through the Operation TIPS program will not be maintained in a database and that he has "been given assurance that the TIPS program will not maintain a database." These assurances were given, according to the Attorney General, by "the individuals who have been shaping the program," though he was "not sure exactly that I could name them." To what government office did the Attorney General make his recommendations?

Answer: The Attorney General advised the Office of Justice Programs and the USA Freedom Corps office of his decision.

Leahy 5. The version before July 25 of the Operation TIPS program description states that the Justice Department plans to recruit 1 million volunteers in the 10 cities where the pilot program will take place.

(A) Will the Justice Department make any effort to evaluate the accuracy or significance of the tips collected?

Answer: It was beyond the scope of the Operation TIPS program to evaluate the validity of each independent tip received. The validity, accuracy, and significance of each piece of information received would have been best determined by the law enforcement agency to which each report would have been referred. The sole function of the Operation TIPS initiative was to provide a prompt and efficient means of routing such reports to law enforcement for its expert analysis.

(B) If so, how will the Justice Department be able to analyze tips submitted by 1 million informants, let alone the presumably larger number that will take part once the program is expanded?

Answer: This question is based on the premise that the information received would have been analyzed by the referral center. This would not have been the case. This would have been a simple hotline and referral system, and reports would have been disseminated to various law enforcement agencies around the country. Because there are approximately 18,000 such law enforcement agencies in the United States, the actual number of referrals received by an individual state or local agency would have been manageable.

This question is also based on the assumption that everyone who would have received information about the hotline would have observed something suspicious and possibly terrorist-related and also would have chosen to call the hotline. Additionally, it was difficult to determine, of the workers who would have received information about TIPS, how many actually would have observed something to report and chosen to do so; but it can be assumed that some lesser number of the workers with access to the hotline would have seen suspicious, potentially terrorist-related activity and chosen to make a report.

Leahy 6. Operation TIPS informants are by definition not trained law enforcement officers and this raises certain practical concerns.

(A) Will Operation TIPS informants receive any instructions or guidance about the activities they should report. If so, please provide a copy to the Committee.

Answer: DOJ would not have provided any instructions or guidance about the activities the volunteers should report. The only information provided to the volunteers would have been related to how to access the hotline; warnings that the hotline was intended only for reporting suspicious activities, not individuals whose appearance or dress was of concern to the caller; a reminder that, in case of a true emergency, the caller should use the 911 system; and prohibitions against invasion of privacy, conducting investigations, or performing any law enforcement function.

(B) What training, if any, will be made available to participants in Operation TIPS?

Answer: See response to 6 (A).

(C) What guidance will TIPS informants receive about the permissible use of race/ethnicity in their evaluation of whether a particular individual's behavior is suspicious?

Answer: TIPS volunteers would have received information that the hotline was intended only for reporting suspicious activities, not individuals whose appearance or dress was of concern to the caller. For example, volunteers may have reported observing a truck parked under a bridge, an unusual vessel in the fishing waters in Maine, or unusual cargo on a truck or in a port.

(D) Does the Attorney General anticipate that TIPS informants will make mistakes and misconstrue information?

Answer: Given that the workers would only have reported what appeared unusual to them, volunteers may have called in a report about something that turned out to be benign. That occurs with any hotline, or with any system now in place for receiving crime reports or reports of potential crimes, but in no way negates the need for their existence. Trained law enforcement officers who would have received the information would have been responsible for an appropriate response.

(E) Would the Attorney General agree that the information submitted by informants under this program is likely to be less helpful and more prone to error than information collected by trained law enforcement professionals?

Answer: Actually, the Attorney General believed quite the contrary. The reason these particular industries were offered the opportunity to participate was because they have special expertise that law enforcement does not. Their extensive familiarity with and knowledge of highways, trucking regulations, waterways, fishing and shipping operations, and the areas in which they work are unique to them.

The trained law enforcement professionals would have been the ones receiving the information and making a determination about any appropriate action that should be taken to further investigate the reports that would have been made. Thus, the hotline would have given law enforcement a means of receiving information that may have constituted a crime in progress. The prompt reporting of such information to police in fact would have enhanced the ability of law enforcement to obtain and promptly investigate such activity.

(F) Given that possibility of error, what right, if any, will individuals have to find out about or challenge information that is reported about them to the Justice Department database?

Answer: There would have been no database created by this initiative. Calls would have been routed directly to law enforcement agencies as the Attorney General stated in his July 25th testimony before the Judiciary Committee. The rights of individual citizens would not have changed as a result of the creation of the routing system.

Leahy 7. **The version before July 25 of the Operation TIPS program states that, "*Every participant in this new program will be given an Operation TIPS information sticker to be affixed to the cab of their vehicle or placed in some other public location so that the toll-free reporting number is readily available.*" The July 25 version omits that part of the description of the program.**

(A) Will every TIPS informant in this program be given an Operation TIPS information sticker?

Answer: NCPC had not yet developed materials for this program. DOJ would have worked with the industries involved to determine what types of materials would have been most useful to provide to workers who would have liked to have information about TIPS.

(B) Will TIPS informants be asked to affixed the TIPS stickers to the cab of their vehicle or placed in some other public location?

Answer: Volunteers would have determined whether or not they wanted to keep the number in a place that would have been easily accessible to them.

(C) Why was this sentence omitted in the July 25 version of the description of the program?

Answer: Information that was only preliminary and had not been finalized, such as the exact types of materials (flyers, brochures, etc.) NCPC would have provided, was removed. Because DOJ was still in program development, we were not prepared to detail in what form the information about the hotline would be provided.

(D) Why will every participant in the TIPS program be provided with a sticker that they are instructed to put in a public place such as the cab of their car?

Answer: Regardless of what form information about TIPS would have taken, volunteers would not have been instructed by DOJ to put such information in any particular place, or even keep it at all. This was a purely voluntary initiative. The reason the stickers would have been provided was to make the hotline number available to workers.

(E) Does the Attorney General believe that these stickers will encourage greater participation in the program?

Answer: Providing information about the hotline would not have been meant to "encourage" participation, but simply to respond to a request from industry to provide a hotline and give the telephone number to industry volunteers. DOJ took a very passive approach to the offering of this hotline to workers. They would not have been recruited, trained, or asked to sign up or to give any indication of their level of interest. Only workers who would have seen out-of-the-ordinary public events, and who would have wanted to call the hotline, should have considered doing so.

(F) Does the Attorney General believe that such a public acknowledgment of participation will have a stigmatizing effect on those who elect not to participate?

Answer: We simply would have provided a telephone number to workers in certain, limited industries. It is difficult to understand how this would have "stigmatized" other industries.

Leahy 8. The Postal Service has apparently declined to have its mail carriers participate in Operation TIPS. What other organizations have declined to participate? What organizations have agreed to participate?

Answer: DOJ, the Department of Labor (DOL), and OHS were working together to identify organizations in the specified industries that would have liked information about TIPS. We were in various stages of discussion with the management of industry groups and had not reached the stage of making participation official. Several associations, e.g., the American Trucking Association, the International Brotherhood of Teamsters, the Owner Operated Independent Drivers Association, and the Seafarers International Union had expressed much interest in this program and strongly supported the concept. The U.S. Postal Service was the only organization with which DOJ had had any discussions relating to Operation TIPS to advise that it no longer would consider participation in the program.

In addition, the Attorney General had made clear that DOJ would not have involved industries in TIPS whose workers have routines that would have taken them onto private property.

Leahy 9. For many years the FBI has had a program called "Awareness of National Security Issues and Response" (or ANSIR) that is managed by the Counterintelligence Division with Agents in each field office. They work

with corporate security officers to build awareness of the foreign intelligence threat to American business firms. The ANSIR Program also has a page on the FBI's Internet Web Site. Why does the Attorney General think an awareness program like this for counterterrorism is not enough?

Answer: The ANSIR Program fills a separate, but critical, need providing information both to the FBI and to corporations about the threats posed by terrorism to those businesses. Unlike ANSIR, Operation TIPS would have provided a means of reporting suspicious activity on highways, waterways, railways, and ports as opposed to office buildings. The information would have been shared with state and local law enforcement, as well as the FBI.

FBI Budget Request Before 9/11

Leahy 11. **On September 10, 2001, the Attorney General signed a Justice Department request to OMB for the Fiscal Year 2003 budget. The FBI had previously submitted a request to the Department for increases for (a) language services ($8,852,000); (b) field counterterrorism investigations ($28,066,000); (c) intelligence production (Field and HQ IRSs) ($20, 894,000); (d) security ($137,566,000); (e) counterintelligence intiative ($30, 355,000); and (f) secure telephone equipment ($6,501,000). Did the September 10th request to OMB include any of these increases that the FBI had requested and, if so, which ones?**

Answer: The Department of Justice's (DOJ) FY 2003 budget request, submitted to the Office of Management and Budget on September 10, 2002, included program increases to bolster the Federal Bureau of Investigation's (FBI) overall law enforcement efforts, including counterterrorism. The process used by the Attorney General for making budget requests is one that actively involves the recommendations made by the Department's Strategic Management Council, which is comprised of senior leaders from across the Department, including the Director of the FBI. The details of the budget recommendations and requests made to OMB are part of the internal deliberative process of the Administration and Department of Justice. In order to assure the President the full benefit of advice from agencies and departments, the Administration treats these working papers as pre-decisional, deliberative documents, and does not release specific information.

Following September 11, 2001, the Department worked collaboratively with the FBI to identify essential resource requirements required to combat terrorism. With the support of Congress, the FBI received $36.9 million from the Attorney General's Counterterrorism fund for immediate needs, $39.7 million in emergency response funding, and $745 million in the first FY

2002 Counterterrorism Supplemental. This funding included resources for extraordinary operational costs of the investigation, equipment, and supplies, Trilogy implementation, Information Assurance, and National Infrastructure Protection Center support. The FBI also received another $10 million in the second FY 2002 Counterterrorism Supplemental to support the operations of the Foreign Terrorism Tracking Task Force, which is a Presidential directive to ensure that federal agencies have the best available information to combat terrorists and their supporters.

Leahy 12. Have any FOIA requests for the Attorney General's September 10, 2001 request to OMB for the FY 2003 budget and the prior FBI request to the Department for the FY03 budget been made? If so, what has been the response to these requests?

Answer: As of September 2002, neither the Department of Justice's Office of Information and Privacy, nor the FBI's Records Management Division, Freedom of Information-Privacy Acts Office have received a formal Freedom of Information Act request related to the Department of Justice's September 10, 2001, request to OMB for the FY 2003 budget, or the FBI's FY 2003 budget request to the Department.

USA PATRIOT Act and Libraries

Leahy 14. The Committee has learned of growing concern among professional librarians that the USA PATRIOT Act is leading to a greater number of federal law enforcement demands for records of the use of library services, as well as orders to librarians to keep those requests secret. There is confusion over whether the orders allow the librarians to disclose the fact of a request, without disclosing any substance such as the name of the person involved. It is also not clear whether these secrecy orders are being issued for general law enforcement purposes beyond the scope of the Foreign Intelligence Surveillance Act.

(A) Please clarify what the Department is doing to impose secrecy on its demands for information from libraries.

(B) How many demands for library information has the Department made since enactment of the USA PATRIOT Act, as well as the legal authority that was used to require secrecy?

(C) How many libraries has the FBI visited (as opposed to presented with court orders) since passage of USA Patriot Act?

(D) Is the decision to engage in such surveillance subject to any determination that the surveillance is essential to gather evidence on a suspect which the Attorney General has reason to believe may be engaged in terrorism-related activities and that it could not be obtained through any other means?

Answer: The Department responded to this question in a letter dated December 23, 2002, from Assistant Attorney General Daniel J. Bryant.

Leahy 15. Sec. 215 of the Act expands the range of records that can be requested from a library or educational institution to include "business records" which may include information about individuals beyond the target of an investigation. What precautions is the Attorney General taking to isolate out only those records related to a specific target? How is the Attorney General ensuring the security and confidentiality of the records of others? How promptly have those records been returned to the institutions from which they were obtained?

Answer: The Department responded to this question in a letter dated December 23, 2002, from Assistant Attorney General Daniel J. Bryant.

Detention of Aliens

Leahy 17. When will the Justice Department be able to give Congress a full accounting of exactly how many aliens have been detained because of their terrorist connections and what the security grounds were for singling them out?

(A) After the Palmer Raids to deport Aradical aliens in 1919 and 1920, Congress held hearings to find out what happened and why due process was ignored. When the current crisis is over, will the Department be prepared to tell us the full story of what happened this time?

Answer: It remains to be seen when "the current crisis" will be "over." We remain engaged in the war on terrorism and the position of the Department of Justice has not yet changed in terms of releasing information about those detained during the course of the investigation related to the September 11th attacks.

The Department's policy is based on the professional judgment of senior law enforcement officials, including those from the Criminal Division of the Justice Department and the Federal

Bureau of Investigation with leading roles in the September 11 investigation. In their view, disclosure of the identities of the detainees would endanger the ongoing investigation. To date, the enemies of our country, although monitoring the govemment's investigation, have had no way of collecting en masse a list of the names of individuals who are deemed by the U.S. Government to be useful investigative sources. While some information may have been available to our enemies, a compendium of the entire universe of information regarding the identities of detainees has never been provided, much less officially confirmed. The disclosure of such information (and the information that would be disclosed in the removal hearings for the detainees) may reveal sources and methods of the investigation to terrorist organizations. This in turn could allow terrorists to evade detection, and it could lead them to alter their future plans, creating greater danger to the public safety.

As of February 5, 2003, the INS had detained a total of 766 persons on immigration violations at some time since September 11, 2001, in connection with the investigation into the terrorist attacks. Of these 766 individuals, 486 have been deported. As of February 5, 2003, 3 individuals remain in INS custody as part of our active September 11th investigation.

It is also important to note that the persons at issue were not being held incommunicado. The immigration detainees have been afforded access to counsel and have been provided with lists of attorneys who may handle their cases on a pro bono basis. In addition, they have been informed of the charges against them, and they have access to the courts and to the press.

(B) Will the Attorney General ensure that the Inspector General reports to the Committee on the results of his investigations of detention complaints?

Answer: The Department will work with the Inspector General to ensure that the Congress, including the Committee, is notified of the Inspector General's findings to the fullest extent consistent with the executive branch's responsibility to safeguard sensitive national security, law enforcement and deliberative information.

Leahy 18. The Justice Department has steadfastly refused to provide Congress with the names of the aliens who have been detained for immigration violations as part of the terrorism investigation. According to the Attorney General, one reason is that providing the names would assist Al Qaeda by telling its leaders which of its members the government has detained. The government has deported or released all but 81 of the immigration detainees.

(A) Does the Attorney General believe that any of those deported or released aliens are Al Qaeda members?

(B) How many of the 81 remaining immigration detainees, if any, does the Attorney General believe are or may be members of Al Qaeda?

Answer: A & B. Because of the continuing and highly sensitive investigations, we cannot comment on whether we believe any of these individuals are or may be members of al Qaeda. We note that it is often very difficult to prove that individuals are members or associates of al Qaeda or other terrorist organizations. In addition, al Qaeda and other terrorist organizations often rely upon individuals to knowingly or unwittingly assist in their operations. That is one of the dangers in releasing the names of detainees: that information may mean more to al Qaeda than to us. We would note however, the fact that a detainee has been deported from the United States on grounds unrelated to terrorism does not indicate that he or she had no knowledge of or connection to terrorism. Even if a detainee could also have been charged with removability on terrorism grounds, the INS was not required to include such a charge, which might itself have jeopardized the ongoing investigation.

In some cases, the decision to remove the individual rather than bring criminal charges may have been based on the fact that a criminal prosecution would have compromised sources or classified evidence. In such cases, the Department has sought to protect American lives by detaining the alien, removing him from this country, and ensuring that he cannot return. In other cases, the investigation may have concluded that the individual violated immigration charges allowing removal, but was not involved in terrorism or other criminal activity.

Leahy 19. The Department of Justice has refused to release the names the hundreds of individuals arrested on immigration charges, because the Attorney General said he did not want to give a list to Osama bin Laden, the al Qaeda network, of the people that we have detained. (Nov. 27, 2001 statement.) How does the Attorney General reconcile that justification for secrecy with his statement of June 10, 2002, in which he identified Abdullah al Mujahir, also known as Jose Padilla as an al Qaeda member who was part of, Aan unfolding terrorist plot to attack the United States by exploding a radioactive dirty bomb?

Answer: Because al Mujahir had an attorney as a material witness, the fact that he had been transferred to military custody was likely to be made public imminently in any event. It was important that the first detention of an American citizen found in the United States as an enemy combatant be done publicly, explaining to the American people why this important step was taken.

Leahy 20. In a July 3 letter to Senator Levin, the Department stated that 752

individuals had been detained for suspected immigration violations and 129 individuals had been detained on criminal charges in connection with the investigation into the September 11 attacks. Last November, the Department said that 1,182 people had been detained, resulting in a discrepancy of 311 persons being detained but not on immigration or criminal charges.

(A) On what grounds were the 311 individuals detained?

(B) Were the 311 individuals detained as material witnesses?

Answer: Soon after the September 11th attacks, many individuals were questioned by federal, state, and local law enforcement agencies about the terrorist attacks but not formally taken into custody. While the Department attempted at one time to keep a count of all persons contacted by law enforcement in connection with the attacks, even if they were just briefly stopped, it became clear that this was impractical. Eventually, the Department concluded that it was better to focus on the individuals who were formally taken into custody because they had violated federal criminal law, the immigration laws, or were believed to have information material to grand jury investigations into the events of September 11th.

On any given day since September 11th, the FBI has followed leads which may have resulted in the apprehension of additional individuals suspected of connections to terrorism. By the same token, persons believed to not be of current investigative interest may have been released from custody or deported. For these reasons, and because public officials have used different sets of numbers, and different definitions of the term "detainee" over time, comparisons of public statements by various officials about the total number of detainees is bound to produce different, and imprecise, numbers.

Leahy 21. The Department has refused to give Congress the number of people being held as material witnesses as part of the anti-terror investigation. Why has the Department adopted that view and what is the legal basis for it?

Answer: Almost all of the material witnesses are or have been witnesses in grand jury proceedings, which impose an obligation of secrecy upon the Department (but not the witness), see Federal Rule of Criminal Procedure 6(e), and are also often sealed by court order. Providing the specific numbers of material witnesses in grand juries investigating a particular matter (the September 11th attacks) as of particular dates would improperly disclose "matters occurring before the grand jury." In addition, it is the Department's position that disclosure of the exact number of persons or any details about persons held as material witnesses could needlessly reveal important information about the progress and scope of the investigation into the September 11th

attacks. As we have noted on other occasions, all persons held as material witnesses have counsel and their detention is reviewed by federal judges in the districts in which they are held.

Leahy 23. The Attorney General's decision to issue a blanket rule closing the immigration proceedings of those who have been detained as part of the antiterrorism investigation has been found unconstitutional by Federal courts in Michigan and New Jersey. Why is the Attorney General opposed to making case-by-case determinations about the need to close hearings instead of depriving the public and the press of access to them?

Answer: It is the considered judgment of senior law enforcement officials in change of the September 11th investigation that case-by-case closure would not adequately safeguard crucial information. Case-by-case closure would risk disclosure of the identities of aliens in special interest cases, even though their identities are sensitive precisely because their disclosure could allow terrorist organizations to discern patterns in the ongoing investigation and to react accordingly. Moreover, case-by-case closure would also compromise the confidentiality of cooperating aliens or witnesses, since observers would be able to discern from the failure of an alien or a witness to oppose closure that he was cooperating with the government. Furthermore, case-by-case closure would not adequately protect information that may appear innocuous in isolation but which can be fitted together to reveal crucial information about the ongoing investigation.

On October 8, 2002, in North Jersey Media v. Ashcroft, the U.S. Court of Appeals for the Third Circuit upheld the closure of immigration hearings for "special interest" aliens, holding that there is no right of public access to immigration court proceedings, such that the closing of immigration proceedings is an appropriate and lawful means of protecting our nation. The Third Circuit stated: "Since the primary national policy must be self-preservation, it seems elementary that, to the extent that open deportation hearings might impair national security, that security is implicated . . . " On May 27, 2003, the U.S. Supreme Court denied the media plaintiffs' petition for a writ of certiorari.

In Detroit Free Press, Inc. v. Ashcroft, U.S. Court of Appeals for the Sixth Circuit considered whether the immigration hearings of Rabbih Haddad, a Lebanese citizen who admits to having been illegally present in the United States for several years, should be open to the press and public. Haddad is the co-founder and former chairman and CEO of the Global Relief Foundation ("GRF"). The U.S. Department of Treasury has frozen the assets of GRF and designated it as a "Specially Designated Global Terrorist," based in part on evidence that Haddad worked for a predecessor to al Qaida in the early 1990s and that GRF had supported al Qaida and other known terrorists. See Global Relief Foundation, Inc. v. O'Neill, 207 F.Supp.2d 779 (N.D. Ill.

2002)(upholding asset freeze), aff'd 315 F.3d 748 (7th Cir. 2002). On August 6, 2002. the Sixth Circuit ruled against the closure of Haddad's immigration proceedings under the closure policy for "special interest" cases, but found that the government had a compelling interest in preventing terrorism and closing such proceedings. On January 29, 2003, the Sixth Circuit denied the government's request for rehearing en banc. In the interim, both an immigration judge and the Board of Immigration Appeals have found Haddad ineligible for asylum and his continued detention warranted because he presents a substantial risk to the national security, and ordered him removed to Lebanon. On June 19, 2003, Haddad filed a petition for review of that final removal order with the Sixth Circuit. The government has moved to dismiss that petition as it was filed out of time.

Leahy 24. Nabil Almarabh agreed to a plea bargain two weeks ago, pleading guilty to entering the United States illegally. As the Washington Post and others have reported, Mr. Almarabh was arrested on September 19 and held in solitary confinement for eight months, during which he was reportedly denied an attorney and any judicial proceeding.

(A) Is it true that he was denied an attorney? If so, why?

Answer: Mr. Almarabh was never denied access to an attorney.

(B) Did he ever appear before a judge between September 19 and May 22, when he was arraigned for illegal entry?

Answer: Mr. Almarabh did not appear before a federal judge prior to his arraignment for illegal entry because, until May 22, he was not in custody in connection with a criminal case and therefore was not entitled to appear before a federal judge.

(C) How many times has he been interviewed by Department of Justice or other government officials?

Answer: Mr. Almarabh has been interviewed, but disclosing when, how many times, or by what officials would improperly disclose investigative information about a case that remains pending.

(D) At the time he was arrested, did the Department suspect that Mr. Almarabh was involved in terrorist activity? What was the basis for that belief?

Answer: Yes. It would not be appropriate, however, to discuss the evidence supporting that

belief while the investigation remains open.

(E) The Washington Post reported that Mr. Almarabh was interviewed in May by the Justice Department's Office of the Inspector General, which is investigating allegations of civil rights violations against detainees. Two weeks later, he was arraigned on the immigration charge. Was the Department's decision to charge Mr. Almarabh only on this minor charge related in any way to the Inspector General's investigation?

Answer: No. The criminal charge against Mr. Almarabh had been filed with the District Court in Buffalo, New York well before the Inspector General's Office announced it was planning to interview him, but the charge remained under seal for some time because authorities were seeking to locate and apprehend fugitives in the case.

(F) After holding Mr. Almarabh since September 19, the Justice Department has now announced that it was "not making any contentions in regard to any involvement by Mr. Almarabh in any acts of terrorism." If he had received an attorney, perhaps the government would have reached the conclusion that he was not a terrorist more quickly. What government interest outweighs the clear interest of those held as material witnesses to receive legal representation, and what is the legal basis for denying such representation?

Answer: The Department cannot comment on whether Mr. Almarabh was a material witness. However, all material witnesses held in custody are entitled to counsel and, if they qualify financially, will have counsel appointed for them by the court. See 18 U.S.C. 3006A(a)(1)(g). As stated earlier, Almarabh was not denied legal representation at any stage of his incarceration.

Data-Mining

Leahy 27. The Foreign Terrorist Tracking Task Force has the ability to search on-line commercial and government databases to look for connections between people. For example, if US intelligence gets information that two people who met with terrorists abroad may be in the United States, the Task Force is able to search on-line databases to find where they live, their phone numbers, their bank accounts, their airline ticket purchases, and other details that not only would show their activities, but also would identify people who associated with them. In fact, if the government had conducted such an analysis using information on two of the 9/11 hijackers, it might have been possible to link those two with all 17 other hijackers and locate them for investigation before the attacks. Is that correct?

Answer: The answer to this question contains law enforcement sensitive information and can be found in attachment A.

Leahy 28. **The new FBI investigative guidelines authorize data mining projects that involve name or key word searches of commercial and government on-line databases. The Attorney General issued no specific policy guidelines for data-mining that would bar the use of data-mining to monitor lawful political and religious expression. Has the Attorney General developed or does he plan to develop such guidelines and, if so, please advise the Committee when will these guidelines will be released?**

Answer: This question apparently refers to information gathering authorizations under Part VI of the Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations. The Guidelines themselves explicitly prohibit misuse of these authorizations to monitor constitutionally protected activities, including lawful political and religious expression. Part VI.C(1) states: "The law enforcement activities authorized by this Part do not include maintaining files on individuals solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of the United States. Rather, all such law enforcement activities must have a valid law enforcement purpose as described in this Part, and must be carried out in conformity with all applicable statutes, Department regulations and policies, and Attorney General Guidelines."

FISA Process

Leahy 31. **The Committee is examining the Justice Department's FBI's performance before the 9/11 attacks, and especially at the decision of FBI Headquarters officials to reject the request from the Minneapolis field office for a FISA search order in the Moussaoui case. FBI Agent Coleen Rowley has alleged that FBI Headquarters officials are too cautious because the Justice Department has a policy of never losing a case before the FISA Court. Is that the Attorney General's policy, or does he expect Department attorneys to make their best judgements on the facts and law in each case?**

Answer: The Department responded to this question in a letter dated December 23, 2002, from Assistant Attorney General Daniel J. Bryant.

OLC Opinion: FISA

Leahy 32. **In the Attorney General's testimony before the Judiciary Committee, he referred to an Office of Legal Counsel memorandum or opinion relating to**

FISA issues and the 'agent of a foreign power' requirement. Please provide a copy of any such memorandum or opinion to the Committee.

Answer: The Department responded to this question in a letter dated December 23, 2002, from Assistant Attorney General Daniel J. Bryant.

USA PATRIOT Act

Leahy 33. **The Committee is looking into reports that FBI Headquarters supervisors were "chilled" and became more cautious in forwarding FISA applications to the Justice Department and to the FISA Court (FISC) during 2000 and 2001, before the 9/11 attacks, because the FISA Court (FISC) barred certain FBI supervisory agents from appearing before it.**

(A) **How many FBI personnel were barred by the FISC from appearing before it?**

(B) **When did the FISC take these actions?**

(C) **How did the FISC communicate these actions to the Justice Department or to the FBI?**

(D) **What actions, if any, did the Justice Department take in response to the communications from the FISC barring certain FBI supervisory agents from appearing before it?**

(E) **Please provide the Committee with any memoranda or communications between or relating to the FISC's actions barring certain FBI supervisory agents from appearing before the FISC.**

Answer: The Department responded to this question in a letter dated December 23, 2002, from Assistant Attorney General Daniel J. Bryant.

Leahy 34. **There are also reports that FISC has not yet implemented the USA PATRIOT Act, which amended FISA to authorize orders if "a significant purpose" is to collect foreign intelligence and to authorize FISA coordination with law enforcement against terrorist and spies. What are the Justice Department's views on this issue. Does the Attorney General think FISC's action had a "chilling" effect on the FBI?**

Answer: The Department responded to this question in a letter dated December 23, 2002, from Assistant Attorney General Daniel J. Bryant.

Computer Trespass

Leahy 35.

(A) Has the computer-trespass provision of the Act been used to investigate or prosecute any alleged hackers?

Answer: Yes.

(B) How many times?

Answer: As with other exceptions to the Wiretap Act, such as consent, the Department does not track the number of times that victims of criminal computer trespasses have elicited law enforcement assistance pursuant to Section 217. Maintaining such records is particularly impracticable in the case of Section 217 because the victim, not law enforcement, initiates contact under the exception and because victims may contact state law enforcement officers or officers in federal law enforcement agencies other than the Department.

Nevertheless, in an attempt to provide approximate information, the Department solicited feedback from knowledgeable prosecutors in the field. Their responses indicate that they are aware of victims of criminal computer intrusions invoking Section 217 to obtain law enforcement assistance in monitoring unauthorized intruders' activity in their networks comparatively rarely, on less than two dozen occasions.

(C) Have any of the alleged hackers whose communications were intercepted under the authority of section 217 been the specific target of a terrorism investigation?

Answer: We do not have firm evidence that any of the alleged hackers whose communications were intercepted in the instances cited in part (B) were the specific target of terrorism investigations. There are indications in a few of these cases, however, that the intrusions pertained to large scale financial fraud orchestrated by foreign perpetrators. It is possible that as these investigations progress, they will reveal a link to terrorist financing.

(D) Please describe the type of owner or operator of a protected computer who has given authority under section 217 and whether that person was an online service provider, an Internet service provider, or some other business?

Answer: In the investigations referred to in part (B), both Internet service providers and other private corporations have solicited law enforcement assistance to monitor the conduct of hackers or trespassers that have infiltrated their systems.

Special Administrative Measures and Other Terms in the Lindh Plea

Leahy 36. The Attorney General testified in December about the great danger posed by federal prison inmates who are selected for Special Administrative Measures (SAMs). So dangerous were these people that he issued regulations allowing eavesdropping on their privileged attorney client conversations. The Department is also criminally prosecuting a defense attorney in New York for violating the SAMs with respect to a client. In the plea agreement that the Attorney General entered with John Walker Lindh, however, the Attorney General agreed that even if it is determined that the SAMs should apply, that he promised to treat him in "a manner comparable to other federal inmates" including granting visitation, access to educational opportunities, television, radio, and newspapers.

(A) What was the rationale for placing the highly restrictive SAMs on Walker and what changed the day that he pleaded guilty that allowed the Attorney General to agree that he should have a television set and get the daily paper?

Answer: The SAMs were imposed on or about March 20, 2002, based on concerns that Lindh's involvement and military support of the Taliban, his participation in an al Qaeda training camp, his expressed commitment to jihad, as well as the very serious nature of the charges alleged in the indictment, presented a substantial risk that his communications or contacts with persons could result in death or serious bodily injury to persons or substantial damage to property.

After he pleaded guilty, a number of factors made it possible and appropriate for the Department of Justice to conclude that it could "endeavor" to permit Lindh to have "access to educational opportunities, prison library privileges, books, magazines, newspapers, radio and television, visitation, and religious observances."

First, Lindh had been in custody at the Alexandria Detention Center since January 24, 2002 and, thus, the Government had almost six months of experience monitoring Lindh. (Although the SAMs were not officially invoked until March 20, 2002 he was held in a manner consistent with the SAMs prior to that date.) This monitoring included FBI review of Lindh's non-attorney/client privileged correspondence and monitoring of Lindh's family visitation. Lindh's compliant behavior during this period of time gave the Department confidence that certain of the SAM conditions could be relaxed.

Second, Lindh's decision to enter into a guilty plea involved a candid admission of culpability, and an agreement fully to cooperate with government investigators and prosecutors. It also reflected an acceptance by Lindh that he would have to spend a substantial portion of the rest of his life behind bars as a consequence of his misconduct. This gave the Department further confidence that certain of the SAM conditions could safely be modified to extend to Lindh some of the same privileges afforded other prisoners.

Third, the modifications contemplated in the plea agreement were those that would present a low security risk. This is evidenced by the interim modification of the SAMs which went into effect on July 25, 2002. The interim SAMs modification permit Lindh, in accordance with Standard Operating Procedures and subject to revocation for abuse, to have unmonitored family visits, to view, listen or read commonly-available media, and to correspond regarding education, as well as to have typical commissary privileges. The FBI (Washington Field Office) concurred in the modification of these SAMs conditions. Other conditions - such as those which preclude visitation from non-immediate family members, which require screening of Lindh's mail, which preclude contact with the media, and which keep Lindh separated from other inmates - have remained in effect. Additional review of the SAMs will continue.

(B) Did the Department of Justice inform the Spann family that it was going to include this term in its plea agreement with John Walker Lindh?

Answer: See the response to Question 37 regarding contact with the Spann family regarding Lindh's Plea Agreement.

(C) If the SAMs are so important that breaking them justifies the criminal prosecution of a defense attorney, how does the Attorney General justify the inclusion of this term in the Walker plea agreement?

Answer: These two situations are not at all comparable. In the case of John Walker Lindh, the Department of Justice - based on its six months of experience holding Lindh in custody, Lindh's compliant attitude with regard to his conditions of confinement, and his acceptance of responsibility for his misconduct - determined that the Government could safely consider a modification of the SAMs.

(D) Has there ever been a plea agreement involving a promise to alter the SAMs before, and, if so, please provide the names and docket numbers of the cases and the dates of the plea agreements.

Answer: There have been several plea agreements that adopt terms very similar to an existing

SAM. The SAM itself may then no longer be necessary since the essential provisions are incorporated in the plea agreement. SAMs are periodically renewed and sometimes altered to reflect changing risk assessments. This may on occasion occur at the same time as a plea.

(E) Does the Department of Justice have any policy on including in plea agreements provisions relating to the administration of prison regulations, such as the SAMs? If so, what is that policy?

Answer: The Department of Justice has no formal policy on including provisions relating to SAMs in plea agreements.

(F) As a legal matter, could the President designate Walker as an enemy combatant after his plea, were there no term in the plea agreement stating otherwise?

Answer: As the question recognizes, the Plea Agreement precludes the Government from exercising"any right it has" to designate Lindh an unlawful enemy combatant unless Lindh engages in future terrorism-related misconduct. The Plea Agreement does not address whether in fact Lindh is an unlawful enemy combatant. It is the Government's view that, had the Plea Agreement not contained the referenced language, the Government would have retained its authority after the plea to designate Lindh an unlawful enemy combatant, assuming he otherwise qualified for such designation.

(G) Was the President personally involved in approving the Walker plea? If not, how could Mr. Walker be assured that he would not be designated an unlawful combatant after his plea? Was the Spann family consulted about this decision?

Answer: It would be inappropriate to comment on any internal deliberations regarding the President's involvement, if any. The Government's representation in the Plea Agreement that Lindh would not be designated an unlawful enemy combatant unless he engaged in future terrorism-related misconduct is a commitment by the United States that is binding on the United States. As to the involvement of the Spann family, please see the response to Question 37.

(H) Will the President have to be involved in all such pleas in the future should such assurances be sought?

Answer: As to the President's future involvement, if any, it would be inappropriate to comment.

(l) What policy, if any, does the Administration have with respect to including terms in plea agreements about designation of the defendant as an enemy combatant?

Answer: The Department of Justice has no formal policy on this issue.

Leahy 37. Earlier this week, the father of the first American killed in combat in Afghanistan - CIA agent Mike Spann - complained that he was not consulted about the Government's plea bargain with John Walker Lindh, which caps the maximum sentence at 20 years. A Justice Department official reportedly said that Spann's family members were informed of the plea negotiations, but were not consulted for their advice. If this is true, why was there no consultation with the victims in this case? Did the Department comply with its internal Guidelines for Victim and Witness Assistance, which requires Government officials to "make reasonable efforts to notify identified victims of, and consider victim views about, any proposed or contemplated plea negotiations?"

Answer: Throughout this prosecution, the Department of Justice has been very sensitive to the grievous loss of the Spann family and their interest in this prosecution. Toward that end, the United States Attorney's Office for the Eastern District of Virginia took a number of steps to facilitate the Spann family's access to, and knowledge concerning, court proceedings. This included providing the Spann family copies of many of our pleadings, assisting the family in getting in and out of the courthouse, and responding to inquiries from members of the family.

As to the plea agreement itself, this matter was handled entirely in accordance with the Attorney General guidelines for Victim and Witness Assistance (2000). Those guidelines state in part:

Responsible officials should make reasonable efforts to notify identified victims of, and consider victim views about, any proposed or contemplated plea negotiations. In determining what is reasonable, the responsible official should consider factors relevant to the wisdom and practicality of giving notice and considering views in the context of the particular case, including, but not limited to, the following factors:

(a) The impact on public safety and risks to personal safety.
(b) The number of victims.
(c) Whether time is of the essence in negotiating or entering a proposed plea.
(d) Whether the proposed plea involves confidential information or

conditions.

(e) Whether there is a need for confidentiality.

(f) Whether the victim is a possible witness in the case.

As demonstrated below, the Government's contacts with the Spann family fully complied with the Attorney General's guidelines.

Plea negotiations began in earnest around 6 p.m. on Friday, July 12, and the agreement was signed by the Government at approximately 1:45 a.m. on Monday, July 15, and entered in Court later that morning. Time was of the essence throughout this process.

Moreover, confidentiality was absolutely critical. Any disclosure to the Spann family would have had to been made with the full recognition that they were under no obligation of confidentiality. In contrast, the Government was most certainly under a strict obligation of confidentiality, for the following reasons:

First, any public disclosure that plea negotiations were underway would almost certainly have resulted in a complete collapse of such negotiations, particularly where such a disclosure was attributable to the Government, directly or indirectly.

Second, any public disclosure that the defendant was considering a plea could severely have prejudiced the defendant's right to a fair trial. At a minimum, it would undoubtedly have led the defense to renew their motion for a change of venue or to dismiss for prejudicial pretrial publicity.

The Government did notify the Spann family prior to the entry of the plea, and this notification took place as soon as practicable after the plea agreement was signed. Johnny Spann, who is Mike Spann's father, was notified by telephone at about 8:40 a.m. Central Standard Time, which was the time in Alabama where Mr. Spann was located. Each of the three line prosecutors were present when the call to Johnny Spann was placed. Shortly after court proceedings concluded, the Government contacted Shannon Spann, Mike Spann's wife, and had a substantial discussion about the terms of the plea. As to both Johnny Spann and Shannon Spann, the Government offered each the opportunity to have further discussions about the terms of the plea. Johnny Spann took the Government up on that offer and met at length with one of the line prosecutors. Subsequently, United States Attorney Paul McNulty offered Johnny Spann the opportunity to meet with him to discuss the plea agreement. Johnny Spann did meet with Mr. McNulty at length on August 15, 2002. A similar offer was extended to Shannon Spann.

AG Override of U.S. Attorneys in Capital Cases

Leahy 38. **According to press accounts, the Attorney General has been the aggressively overriding the recommendations of the Department prosecutors and seeking to impose the death penalty in cases where life imprisonment had been recommended.**

(A) **How many times has the Attorney General reversed the recommendations of local Federal prosecutors and ordered them to seek the death penalty in cases where they had advised against doing so, or turned down a plea deal in favor of pursuing the death penalty? For each case, please explain the reasons for overriding the judgment of the local prosecutors.**

(B) **For each case that was brought in a non-death penalty State, please describe the Federal interest that justified Federal, as opposed to State or local, prosecution, and what consideration, if any, the Attorney General gave to the fact that the offense occurred in a State where the imposition of the death penalty was not authorized by law.**

Answer: In each death penalty eligible case, the Attorney General's decision whether to seek the death penalty is made only after receiving and considering the recommendation and analysis of the United States Attorney, the Attorney General's Capital Case Review Committee, and the Deputy Attorney General. A decision whether to seek the death penalty in all instances is based on the facts of the offense and the balance of the aggravating and mitigating factors, with full regard to identified prosecutorial considerations and all advice. Because it is important that the death penalty law be administered in a fair and even handed manner without regard for regional or personal biases, the fact that the federal death-penalty eligible offense occurred or is being prosecuted in a so-called non-death penalty state is irrelevant to the considerations.

We are not providing case-specific information on Attorney General decisions, if any, not to follow the recommendations of United States Attorneys with regard to the appropriateness of seeking the death penalty because to provide such information would necessarily reveal the recommendations themselves. The confidentiality of these recommendations is essential to the integrity and effectiveness of the internal Department deliberative process that underlies the Attorney General's decisions.

<u>Corporate Accountability</u>

Leahy 39. **In February, in the wake of the Enron/Andersen scandal - which unfortunately has now become the Enron/Andersen/Tyco/Xerox/WorldCom crisis -- I introduced S. 2010, the Corporate and Criminal Fraud Accountability Act. On both sides of the aisle, Senators felt that action was**

needed to restore accountability in our public markets. The Department took no position on S. 2010 as it was crafted or even as the Senate Judiciary Committee unanimously reported the bill in April. On July 1 the Majority Leader and I wrote to the President asking whether the Administration would support the Sarbanes and Leahy reform bills. We received no answer as the Senate debated the measures, no answer as the Senate passed both *by a vote of 97-0*, and no answer as the conference concluded its work:

(A) Why did the Department of Justice absent itself from what the President called the most important white collar crime reform effort since Franklin Delano Roosevelt, providing no technical assistance or views on the legislation until the time that it was signed into law by the President?

(B) Is white collar crime enforcement a top priority of the Department of Justice?

(C) The Department of Justice was directed by the President to head a Corporate Fraud Task Force. Why is the Attorney General not on the task force, when the other agencies involved are all represented by their agency heads? Is the Attorney General's absence in any way related to his quite proper decision to recuse himself from the Enron case? (D) What role, if any, will the Attorney General play on the Task Force?

(E) Is the Attorney General recused from any other white collar matters (besides Enron)? If so, please name them.

Answer to (A-E): The vigorous enforcement of the laws against economic crimes is one of the top priorities of the Department, standing behind only our efforts in the war against terrorism. We are dedicated to rooting out corporate fraud and restoring the confidence of America's investors in the transparency and honesty of business and the markets. The Department has focused intensely on this effort with impressive results. We have successfully prosecuted Arthur Andersen LLP for obstructing justice and secured the arrest or indictment of executives at WorldCom, Adelphia, Enron, Health South, ImClone, Qwest, Kmart, Dynegy, El Paso Corporation, American Tissue, Symbol Technologies, Anicom, Peregrine Systems, Homestore.com, RiteAid, Mercury Finance, Commercial Financial Services, Aura Systems, Motor Car Part and Accessories, and many other companies on fraud charges. Our prosecutors have been hard at work, obtaining convictions of more than 7,000 white collar defendants in fiscal year 2001 and more than 7,500 white-collar defendants in fiscal year 2002.

The Department participated throughout the corporate accountability legislative effort by providing analysis and assistance in preparing the President's proposals to Congress. As you are aware, the Administration made numerous comments and proposals to Congress throughout the process, and these were prepared in consultation with the Department. In addition, the Department provided three witnesses to testify during June and July 2002 in the Senate Judiciary Committee's Subcommittee on Crime and Drugs concerning the Department's recommendations on white-collar criminal matters. On June 19, 2002, United States Attorney for the Southern District of New York James Comey testified before that subcommittee and provided the Department's views on appropriate punishments in white collar cases. On July 10, 2000, Assistant Attorney General for the Criminal Division Michael Chertoff and United States Attorney for the District of Montana William Mercer testified before that subcommittee to further express the Department's views on white collar criminal enforcement and to comment specifically on corporate fraud enforcement. We hope that these views were considered in increasing the statutory maximum penalties for several offenses and in drafting those portions of the Sarbanes-Oxley Act that called on the United States Sentencing Commission to consider raising the guidelines penalties for obstruction of justice and corporate fraud.

By Executive Order of July 9, 2002, the President established the Corporate Fraud Task Force to oversee and coordinate the enforcement activities of both the Department and a group of other federal law enforcement agencies directed against corporate fraud. The President appointed the Deputy Attorney General to lead the Task Force, amplifying the Deputy Attorney General's existing role of overseeing and coordinating the Department's law enforcement activities subject to the supervision of the Attorney General. The Deputy Attorney General reports regularly on the progress of corporate fraud matters to the Attorney General, and the Attorney General himself has spoken with the Corporate Fraud Task Force to direct them in their mission. Policy and legislative recommendations proposed by the Corporate Fraud Task Force will be subject to the approval of the Attorney General. Members of the Attorney General's staff attend meetings of the Corporate Fraud Task Force as well.

The Attorney General made the decision to recuse himself from the Enron matter based on an analysis of the totality of the circumstances. This recusal has not effected the Attorney General's overall supervision of the work of the Corporate Fraud Task Force and has played no role in the organization of the Corporate Fraud Task Force. Analyzing the totality of the circumstances, the Attorney General decided to recuse himself from the Enron matter. There are many factors that determine when and if a recusal is appropriate in any given matter. The Attorney General has not recused himself from any other white-collar criminal matter at this time.

Foreign Terrorist Tracking Task Force

Leahy 40. The Foreign Terrorist Tracking Task Force was established by the President in his Homeland Security Directive No. 2 last year, and several of its major participants the INS, the Customs Service, and the Secret Service would move to the new Homeland Security Department. If the new department is going to have a strong analytic function, should the Foreign Terrorist Tracking Task Force be moved from the Justice Department to the analysis division of the new department?

Answer: The FBI has established interagency Joint Terrorism Task Forces in all 56 field offices. The FBI has established an interagency National Joint Terrorism Task Force (NJTTF) at FBI Headquarters.

By memorandum dated August 6, 2002, the Attorney General ordered the Director of the FBI to "formally consolidate" the FTTTF within the Counterterrorism Division of the FBI, as part of "Phase II" of the FBI's reorganization. However, consistent with the original Presidential order creating the FTTTF, the Director of the FTTTF reports both to the Director of the FBI and to the Deputy Attorney General, which promotes coordinated information sharing with the highest levels of the Department of Justice. Congressional concurrence is being sought to move the FTTTF to the Office of Intelligence as part of an integrated plan to transform intelligence within the FBI. This move is consistent with the FBI's efforts to strengthen its entire intelligence apparatus, and will maximize a number of unique core competencies of the FTTTF. One of the FTTTF's core functions is to provide information that locates or detects the presence of known or suspected terrorists within the United States by exploiting public and proprietary data sources to find an "electronic footprint" of known and suspected terrorists. The FTTTF provides day-to-day support to the Counterterrorism Division and JTTFs in locating known and suspected terrorists and is an integral part of FBI counterterrorism operations. Hence, it is our belief that the FTTTF belongs within the Department of Justice and the FBI so that it can continue to provide direct support to counterterrorism investigations.

Leahy 41. What is the Justice Department's new Foreign Terrorist Tracking Task Force doing now that was not done before 9/11 and how would the Task Force help disrupt a similar plot today?

Answer: The answer to this question contains law enforcement sensitive information and can be found in attachment A.

National Infrastructure Protection Center

Leahy 43. The Administration bill proposes transferring to the Homeland Security

Department part of the FBI's National Infrastructure Protection Center (NIPC) by separating the analysis, warning and outreach activities of NIPC from the FBI's expert interagency investigative teams within the Computer Investigations and Operations Section, which responds immediately to cybe attacks and devises sophisticated operations to defeat them. Under the direction of NIPC, FBI agents throughout the country are building a strong locally-based program called Infra Guard to share threat and security information through chapters in each of the FBI's 56 field offices with over 4,000 members from business, academic institutions, and local law enforcement. Splitting NIPC raises practical concerns about the impact on the overall effectiveness of the program.

(A) What would happen to the FBI agents supporting Infra Guard chapters across the country if the new Department is created?

Answer: InfraGard should be fully functional and operational in all 56 field offices of the FBI. Agents currently assigned to InfraGard will remain employees of the Bureau but will be detailed to DHS. Each agent will also remain in his/her Bureau field office but will report information c InfraGard to DHS, as information is received. Clients will still be urged to report intrusions/threats to local field offices and agents will distribute info over secure server/adjoinir network to DHS. Ultimately, what will most likely occur is the InfraGard program will become facet of DHS and slowly the FBI will be phased out of any involvement with the program. Agents who were once involved will continue to serve as FBI agents, however in a different capacity/specialization. Additionally, our concern is that once the transition occurs, will the responsibility of the NIPC and all field related functions then be assigned to the Secret Service, considering that 1) attempts were made by both entities to discuss issues but agreements were n reached and 2) the Secret Service has technical expertise in computer investigations, through its Electronic Crimes Special Agent Program.

(B) What should be done by the FBI and the new Department to reduce the risk will that information may be delayed or fall between the cracks, particular when it comes to investigations and operations that detect warning of an attack on a critical computer system?

Answer: The FBI and DHS will coordinate efforts to work together to ensure information sharing on a daily basis, at minimum. Communication between the two entities will assure a smooth transition, in addition to resolving any possible threats or vulnerabilities to critical infrastructures by information warfare, foreign intelligence services, cyberterrorism, organized crime/other financially motivated individuals, insiders, virus writers, hackers, and/or hacktivists

(C) Cyber attacks may be launched not just by terrorists. In an international crisis, the greatest strategic threat is from foreign governments and their intelligence services. What should be by the FBI and the new Department done to ensure that indications of a strategic attack that are detected by the FBI are evaluated and disseminated effectively?

Answer: Please see answer to B above.

<u>Congressmen Sensenbrenner and Conyers' USA PATRIOT Act Implementation Questions</u>

Leahy 44. Section 103 of the Act authorizes funding for the FBI Technical Support Center originally authorized by section 811 of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132). What is the status of the Technical Support Center and what plans are in place or being developed to establish the FBI Technical Support Center?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 45. Section 106 of the Act authorizes the President to confiscate property of foreign persons, organizations, or countries involved in armed hostilities. According to press reports, the President has ordered on several occasions the confiscation of property pursuant to that section. How often and under what circumstances has the President exercised that authority? Has the President exercise of that authority been challenged in court? If so, please identify the case(s) and provide the status of any proceeding involving the exercise of that authority?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 46. Section 203 of the Act authorizes disclosure of grand jury information consisting of certain foreign intelligence or counterintelligence information to (A) other federal law enforcement officials; (B) intelligence officials; (C) protective officials; (D) immigration officials; (E) national defense officials; or (F) national security officials pursuant to Fed.R.Crim.P. 6(e)(3)(C)(i)(V).

(A) How many times has the Department of Justice made such disclosures?

(B) For each disclosure, indicate whether the information related to a matter involving foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. Â'401a)) or foreign intelligence information (as defined in Rule 6(e)(3)(C)(iv)).

(C) How many separate grand juries were the source of such information?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 47. Section 203 of the Act also requires that the court supervising a grand jury be notified within a reasonable time when certain foreign intelligence or counterintelligence information is disclosed pursuant to that section. How many notices have been filed with U.S. courts pursuant to this requirement? What has been the average time period between the disclosure and the notice to the court? What has been the longest time period? What has been the shortest time period?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 48. Section 203(b) authorizes disclosure of Title III electronic, wire, and oral intercept information consisting of certain foreign intelligence or counterintelligence information to (1) Federal law enforcement; (2) intelligence officials; (3) protective officials; (4) immigration officials; (5) national defense officials; or (6) national security officials. How many times has the Department of Justice made such disclosures under this authority?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 49. Section 203(c) of the Act requires the Attorney General to establish procedures for disclosures to the court of grand jury foreign intelligence or counterintelligence information and electronic wire and oral intercept information that identifies an American citizen or a permanent resident

alien. Have those procedures been established? Please provide a copy of them to the Committee.

Answer: In response to your request, the Department forwarded to Chairman Leahy and Ranking Member Hatch our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 50. **Section 203(d) of the Act authorizes the disclosure of certain foreign intelligence or counterintelligence or foreign intelligence information to (1) Federal law enforcement; (2) intelligence officials; (3) protective officials; (4) immigration officials; (5) national defense officials; or (6) national security officials. How many times has the Department of Justice disclosed such information?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 51. **Section 206 of the Act authorizes the FISA court to issue an order that can be used to obtain assistance and information from any common carrier, landlord, or custodian when the court finds that the target of the surveillance may take actions that may have the effect of thwarting the identification of a specified person to assist in effectuating a FISA order. How many times has the Department of Justice obtained such orders?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 52. **Section 212 of the Act authorizes any electronic communications service provider to disclose communications if it reasonably believes that an emergency involving immediate danger of death or physical injury to any person requires disclosure. How many times has the Department of Justice received information under this authority? In how many of those cases did the government, not a private person, submit the information suggesting immediate danger of death or physical injury?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters,

dated July 29, 2002 and August 26, 2002.

Leahy 53. **Section 214 authorizes the Department of Justice to obtain orders authorizing the use on facilities used by American citizens and permanent resident aliens of pen registers and trap and trace devices in foreign intelligence investigations. How many times has the Department of Justice obtained orders for use on facilities used by American citizens or permanent resident aliens? What procedures are in place to ensure that such orders are not sought solely on the basis of activities protected by the First Amendment to the U.S. Constitution?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 54. **How many applications and orders, pursuant to Section 215 of the Act, have been made or obtained for tangible objects in any investigation to protect the United States from international terrorism or clandestine intelligence activities? What procedures are in place to ensure that such orders are not sought solely on the basis of activities protected by the First Amendment to the U.S. Constitution? How many total applications have been made and of those, how many applications were made by FBI Assistant Special Agents in Charge, rather than a higher ranking official? How many orders have been issued upon the application of FBI Assistant Special Agents in Charge?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 55. **Has Section 215 been used to obtain records from a public library, bookstore, or newspaper? If so, how many times has Section 215 been used in this way? How many times have the records sought related to named individuals? How many times have the records sought been entire databases? Is the decision to seek orders for bookstore, library, or newspaper records subject to any special policies or procedures such as requiring supervisory approval or requiring a determination that the information is essential to an investigation and could not be obtained through any other means?**

Answer: In response to your request, the Department forwarded to the Committee our responses

to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 56. **How many roving pen register and trap and trace orders have been issued under section 216 of the Act? How many Armey notices, reporting on the details of the installation of roving pen registers or trap and trace devices, have been filed with U.S. courts pursuant section 216 of the Act? How many Armey notices were related to a terrorism investigation?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 57. **Since enactment of the Act, how many FISA surveillance order applications certifying under section 218 of the Act that are significant purposes of the surveillance was the collection of foreign intelligence information could not have certified, pursuant to prior law, that a purpose was the collection of foreign intelligence information?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 58. **How many U.S. citizens or lawful permanent residents have been subject to new FISA surveillance orders since enactment of the Act? How many U.S. citizens or lawful permanent residents were subject to such orders during the same period in the prior fiscal year?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 59. **How many single-jurisdiction search warrants have been issued pursuant to Rule 41(a)(3) of the Federal Rules of Criminal Procedure as amended by section 219 of the Act?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 60. **How many search warrants for electronic evidence have been served under section 220 of the Act in a jurisdiction other than the jurisdiction of the court issuing the warrant?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 61. **Have any claims been filed against the United States or has any official of the Department of Justice been sued or disciplined administratively pursuant to section 223 of the Act for violations of Title III, chapter 121, or FISA?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 62. **Has the sunset provision in section 224 of the Act hampered the DOJ in its efforts against terrorism or any other criminal or intelligence investigation?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 63. **Have sections 205 (relating to employment of translators by the FBI), 908 (relating to training government officials regarding identification and use of foreign intelligence), 1001 (relating to certain duties of the Inspector General of the Department of Justice), 1005 (relating to assisting first responders), 1007 (relating to DEA Police Training in Southeast Asia), 1008 (relating to a study of biometric identifiers), 1009 (relating to study of access) of the Act been implemented? If so, please provide an explanation of the steps that have been taken to implement these provisions and the results. If these provisions have not been implemented, please explain why they have not been utilized?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 64. **Please explain how the amendments made by sections 207, 214, 215, and 218,**

of the Act and section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Pub. L. No. 107-108) have helped intelligence investigations both operationally and administratively?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 65. **Section 211 of the Act was intended to clarify what information cable companies could disclose to law enforcement authorities. How has this provision operated in practice?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 66. **Have sections 310 and 313 of the Intelligence Authorization Act for Fiscal Year 2002 (Pub. L. No. 107-108) been complied with and if not, why not?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 67. **FBI Director Mueller, in an April 19, 2002 speech before the Commonwealth Club of California, stated that the FBI's investigation, among other things, helped prevent more terrorist attacks. The Committee is extremely interested in learning about terrorist attacks that have been prevented and cooperation with our partners both at home and abroad. Therefore, please advise the Committee as to how many terrorist attacks have been prevented since September 11, 2001, how (in general terms without divulging classified sources and methods) were they prevented, and where were these terrorist attacks planned to have taken place? Please describe what authorities in the Act were used and how they helped to prevent these attacks.**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 68. **Were any authorities in the Act used in the investigations of Zacarias**

Moussaoui, John Walker Lindh, Richard Reid, Jose Padillo, and Abu Zubaydah? If so, which authorities were used and, without compromising evidence in pending cases or sources or methods, what leads or evidence did they produce?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 69. **Some public officials have complained that shortly after the September 11 attacks, the Department of Justice improperly detained hundreds of potential suspects and kept their names secret from the public. What authorities, if any, under the Act were used to detain these individuals and keep their names secret? If no authorities under the Act were used, please explain on what authority these individuals were detained and their names kept secret?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 70. **How many FISA applications for surveillance authority and how many FISA applications for search authority have been approved since enactment of the Act? How many surveillances and how many searches have been conducted pursuant to those approved applications?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 71. **The Department of Justice promulgated regulations that permitted in certain cases listening to conversations between prisoners and their lawyers. What authority, if any, under the Act was used to promulgate that regulation? If no authority under the Act was used, please explain the authority used to promulgate the regulation.**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 72. Section 401 authorizes the Attorney General to waive any FTE cap on personnel assigned to the Immigration and Naturalization Service (INS) on the Northern Border.

(A) How many Border Patrol Agents have been assigned or reassigned to the Northern Border under the authority conveyed by this provision?

(B) How many Inspectors have been assigned or reassigned to the Northern Border under the authority conveyed by this provision?

(C) How much does the Attorney General estimate that this provision has cost?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 73. Section 402 authorizes appropriations to triple the number of INS Border Patrol Agents and Inspectors in each state along the Northern Border, and also authorizes appropriations to provide necessary personnel and facilities to support such personnel.

(A) What steps has the INS taken to hire additional Inspectors at the Ports of Entry along the Northern Border?

(B) Has the INS been actively recruiting additional Inspectors for the Northern Border?

(C) Has the INS reassigned other Inspectors from the other Ports of Entry to the Northern Border Ports? If so, how many Inspectors has it reassigned, and what has it done to replace those Inspectors?

(D) Has the INS needed to expand its training capacity to accommodate additional Inspectors? If so, what has it done, and what has this cost?

(E) What steps has the INS taken to hire additional Border Patrol Agents to serve along the Northern Border?

i. Has the INS been actively recruiting additional Border Patrol Agents for the Northern Border?

ii. **Has the INS reassigned other Border Patrol Agents from elsewhere in the United States to the Northern Border? If so, how many agents has it had to reassign, and what has it done to replace those Border Patrol Agents?**

iii. **Has the INS needed to expand its training capacity to accommodate additional Border Patrol Agents? If so, what has it done to expand training capacity, and what has this cost?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 74. **Section 402 also authorizes the appropriation of $50,000,000 to the INS and the U.S. Customs Service to make improvements in technology for monitoring the Northern Border and acquiring additional equipment for the Northern Border.**

(A) **What improvements in technology has the INS undertaken along the Northern Border using the appropriation in section 402 of the Act? Has the INS seen any improvement in its ability to monitor the Northern Border as a result of undertaking those improvements?**

(B) **What additional equipment has the INS acquired for use at the Northern Border under the authority conveyed by section 402 of the Act? Has the INS seen any improvement in its ability to monitor the Northern Border as a result of adding that equipment?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 75. **Section 403 requires the Attorney General and the Director of the Federal Bureau of Investigation (FBI) to provide the State Department and the INS access to criminal history record information contained in the National Crime Information Center's Interstate Identification Index (NCIC-III), Wanted Persons File, as well as to any other files maintained by the NCIC that may be mutually agreed upon by the Attorney General and the agency receiving the access, for the purpose of determining whether or not a visa**

applicant or an applicant for admission has a criminal history record indexed in any such file. Access is to be provided by placing extracts of the records in the automated visa lookout or other appropriate database. In order to obtain access to full records, the requesting entity must submit fingerprints and a fingerprint processing fee to the FBI.

(A) What steps have been taken by the Department of Justice to implement this section?

(B) What has been the cost of implementing this provision?

(C) Has the Department of Justice agreed to provide access to other files maintained by NCIC to either the INS or State Department? If so, which files, and to which entity has the Attorney General provided access?

(D) Have any applicants seeking admission or seeking visas who have criminal histories been identified under this provision thus far? If yes, how many? How many of those aliens would not have been identified in the visa or admission application process if access to NCIC-III had not been provided to the identifying entity?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 76. Section 404 waives the overtime cap on INS employees in the Department of Justice Appropriations Act, 2001 (as enacted into law by Appendix B (H.R. 5548) of Public Law 106-553 (114 Stat. 2762A-58 to 2762A-59)) of $30,000 per employee per calendar year.

(A) Does the Attorney General anticipate that any INS employees will be paid more than $30,000 in overtime this fiscal year?

(B) If so, how many INS employees does the Attorney General anticipate will be paid more than $30,000 in overtime this calendar year?

(C) How much does the Attorney General anticipate that this provision will cost this fiscal year?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 77. **Section 405 requires the Attorney General, in consultation with the Secretaries of State, the Treasury, and Transportation, as well as other appropriate agency heads to report to Congress on the feasibility of enhancing the FBI's Integrated Automated Fingerprint Identification System (IAFIS) and other identification systems to better identify aliens wanted in connection with criminal investigations in the United States or abroad, before those aliens are issued visas or are admitted to or allowed to leave the United States. The section authorizes an appropriation of $2,000,000 for this purpose.**

(A) **Has the Justice Department started to evaluate the feasibility of using IAFIS and other databases to identify aliens wanted on criminal charges?**

(B) **What steps has the Justice Department taken in response to this provision?**

(C) **Is the Justice Department devising a comprehensive database to identify criminal aliens before they enter the United States? If so, what barriers does the Attorney General anticipate Justice will encounter in achieving this goal? Subtitle B of Title IV of the Act, captioned "Enhanced Immigration Provisions" amends the terrorism provisions of the Immigration and Nationality Act (INA), gives the Attorney General additional authority to detain certain suspected alien terrorists, and improves systems for tracking aliens entering and leaving the United States and for inspecting aliens seeking to enter the United States.**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 78. **Section 411 amends the INA to broaden the scope of aliens ineligible for admission or deportable due to terrorist activities. This section also defines "terrorist organization" and the term "engage in terrorist activity."**

(A) **Has the INS relied upon the definitions provided under section 411 to file any new charges against any aliens in removal proceedings? If so, how many**

times has it used each provision?

(B) Has any alien been denied admission on these new grounds of inadmissibility? If so, how many?

(C) What effect have the amendments to the INA in section 411 of the Act had on ongoing investigations in the United States?

(D) As amended by section 411 of the Act, section 212(a)(3)(B)(i)(VI) of the INA renders inadmissible any alien who has used his position of prominence within any country to endorse or espouse terrorist activity or to persuade others to support terrorist activity or a terrorist organization, in a way that the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities. Has the Secretary of State made such a determination under this provision?

(E) Section 212(a)(3)(F) of the INA, as amended by section 411 of the Act, renders inadmissible any alien who the Attorney General determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities endangering the United States. Has the Attorney General made such a determination with respect to any alien thus far?

(F) Have there been any challenges to the constitutionality of the charges added to the INA by section 411 of the Act? If so, please identify the case(s) and the status of any proceeding.

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 79. Section 412 of the Act (1) provides for mandatory detention of an alien certified by the Attorney General as a suspected terrorist or threat to national security; (2) requires release of such alien after seven days if removal proceedings have not commenced, or if the alien has not been charged with a criminal offense; (3) authorizes detention for additional periods of up to six months of an alien not likely to be deported in the reasonably foreseeable future if release will threaten our national security or the safety of the community or any person; and (4) limits judicial review to

habeas corpus proceedings in the U.S. Supreme Court, the U.S. Court of Appeals for the District of Columbia, or any district court with jurisdiction to entertain a habeas corpus petition; and (5) limits the venue of appeal of any final order by a circuit or district judge under section 236A of the INA to the U.S. Court of Appeals for the District of Columbia.

(A) How many times has the Attorney General issued a certification under section 236A(a)(3) of the INA?

(B) If the Attorney General has issued certifications under this provision, how many of the aliens for whom certifications have been issued have been removed?

(C) How many aliens for whom the Attorney General issued certifications are still detained? At what stage of the criminal or immigration proceedings are each of those cases?

(D) What were the grounds for those certifications?

(E) How many of the aliens who were certified have been granted relief? How many of those aliens are still detained?

(F) Have any challenges to certifications under section 236A(a)(3) of the INA been brought in habeas corpus proceedings in accordance with section 236A(b)? If so, please identify the case(s) and the status of each proceeding?

(G) Has the Attorney General released any aliens detained under section 236A of the INA because the alien was not charged with a criminal offense or placed into removal proceedings within seven days?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 80. Section 413 authorizes the Secretary of State, to share, on a reciprocal basis, criminal- and terrorist-related visa lookout information in the State Department's databases with foreign governments.

(A) Has the authority provided under section 413 been used?

(B) If that authority has been used, has it uncovered relevant and material information on any pending or ongoing immigration matters? Has that authority led to the discovery of relevant and material information on suspected activity?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 81. Section 414 of the Act declares the sense of Congress that the Attorney General should: (1) fully implement the integrated entry and exit data system for airports, seaports, and land border ports of entry with all deliberate speed; and (2) begin immediately establishing the Integrated Entry and Exit Data System Task Force. It also authorizes appropriations for these purposes, and requires the Attorney General and the Secretary of State, in developing the integrated entry and exit data system, to focus on the use of biometric technology and the development of tamper-resistant documents readable at ports of entry.

(A) What steps has the Department of Justice taken to implement the integrated entry and exit data system for airports, seaports, and land border ports of entry?

(B) How soon does the Justice Department think that the integrated entry and exit data system for airports, seaports, and land border ports of entry will be implemented? Will it be implemented for air-, land-, and seaports at the same time, or will it be implemented sequentially?

(C) How much will it cost to implement an integrated entry and exit data system for airports, seaports, and land border ports of entry?

(D) How many meetings has the Entry and Exit Data System Task Force held since the enactment of the Act?

(E) What was the agenda of those meetings and what has been the outcome of those meetings?

Answer: In response to your request, the Department forwarded to the Committee our responses

to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 82. Section 415 amends the Immigration and Naturalization Service Data Management Improvement Act of 2000 to include the Office of Homeland Security in the Integrated Entry and Exit Data System Task Force. Has this been accomplished?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 83. Section 416 of the Act directs the Attorney General to implement fully the foreign student monitoring program, and to expand that program to include other approved educational institutions like flight, language training, or vocational schools. In addition, that section authorizes appropriation of $36,800,000 to carry out the purposes of the section.

(A) What steps has the Justice Department taken to implement the foreign student monitoring program, in accordance with section 416 of the Act?

(B) How soon will the foreign student monitoring program be fully implemented?

(C) How much does the Attorney General estimate it will cost to fully implement the foreign student monitoring program?

(D) Prior to full implementation of the program, how will the Justice Department monitor student compliance with the requirements of their student visas? Does the Department of Justice have the resources to take action against aliens who violate their student status in the United States? Since the date of enactment of the Act, how many removal proceedings have been initiated against foreign students who have violated the terms of their visas?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 84. Section 417 of the Act requires the Secretary of State to perform audits and

submit to Congress reports on implementation of the requirement that visa waiver countries under section 217 of the INA issue their citizens machine-readable passports. It also advances the date by which aliens are seeking admission under the visa-waiver program are required to present machine-readable passports from October 1, 2007 to October 1, 2003. A waiver is provided to this requirement for nationals of countries that the Secretary of State finds (1) are making progress toward providing machine-readable passports and (2) have taken appropriate measures to protect their non-machine-readable passports against misuse. Has the Justice Department been working with the Secretary of State in fulfilling his responsibilities under section 417 of the Act? If so, please describe the actions the Justice Department is taking to work with the Secretary of State.

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 85. **Section 418 of the Act directs the Secretary of State to review how consular officers issue visas to determine if consular shopping is a problem. Has the Justice Department been working with the State Department in completing this review? If so, please describe the actions the Justice Department is taking to work with the Secretary of State.**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 86. **Subtitle C of the Title IV of the Act generally authorizes the Attorney General to preserve immigration benefits for those aliens who would otherwise have lost eligibility for those benefits due to the terrorist attacks on September 11, 2001.**

(A) **How many applications for special immigrant status from principal aliens under section 421 of the Act has the INS received since that provision was enacted?**

(B) **How many applications for special immigrant status filed by spouses and children of principal aliens under section 421 of the Act has the INS received since that provision was enacted?**

(C) How many applications for special immigrant status filed by grandparents of orphans under section 421 of the Act has the INS received since that provision was enacted?

(D) How many aliens does the Justice Department anticipate will be eligible for benefits under section 421?

(E) Describe the process that the INS is using to adjudicate and to investigate applications for special immigrant status under section 421 of the Act.

(F) Has the INS determined that any of the applications filed under section 421 of the Act were fraudulent? If so, how many applications were determined to be fraudulent?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 87. Section 422 of the Act states that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the September 11 attacks may remain in the United States until his or her normal status termination date or September 11, 2002. That section includes in such extension of status the spouse or child of such an alien or of an alien who was killed in those attacks, and authorizes employment during the period of that status. It also extends specified immigration-related deadlines and other filing requirements for aliens (and spouses and children) who were directly prevented from meeting such requirements as a result of the September attacks respecting: (1) nonimmigrant status and status revision; (2) diversity immigrants; (3) immigrant visas; (4) parolees; and (5) voluntary departure.

(A) Describe the process that the INS is using to evaluate applications for extension of nonimmigrant status under section 422(a) of the Act.

i. How many aliens have applied for extensions under that section?

ii. Is the INS investigating the veracity of those applications? Describe the steps that the INS is taking to investigate those applications.

iii. Has the INS identified any fraud in connection with those

applications? If so, how many were believed to be fraudulent?

(B) How many aliens have applied for extension of the filing deadline for extension or change of nonimmigrant status under section 422(b)(1) of the Act?

i. Describe the process for extending those deadlines.

ii. Describe the steps that the INS is taking to assess the veracity of applications to extend those deadlines.

iii. Has the INS identified any fraud in connection with those applications? If so, how many applications were believed to be fraudulent?

(C) How many departure delays under section 422 of the Act has the Justice Department seen since the implementation of that act?

(D) Has the INS received any applications from aliens who were unable to return to the United States and apply for extensions of nonimmigrant status in a timely manner because of the September 11 terrorist attacks?

(E) How many applications for waiver of the fiscal-year limitation on diversity visas under section 422(c) of the Act has the INS received?

i. Describe the process that the INS is using to assess the veracity of applications to extend those deadlines.

ii. Has the INS identified any fraud in connection with those applications? If so, how many were believed to be fraudulent?

(F) How many visas that would have expired but for the extension in section 422(d) of the Act has the INS processed?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 88. **Section 424 of the Act amends the INA to extend the visa categorization of "child" of aliens who are the beneficiaries of applications or petitions filed on or before September 11, 2001, for aliens whose 21st birthday is in September 2001 (90 days), or after September 2001 (45 days).**

(A) **In how many cases has the special "age-out" provision in section 424 of the Act been utilized since the enactment of that provision?**

(B) **How many aliens does the INS believe are in the possible class of aliens who would benefit from the special "age-out" provision in section 424 of the Act?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 89. **Section 425 of the Act authorizes the Attorney General to provide temporary administrative relief to an alien who, as of September, 10, 2001, was lawfully in the United States and was the spouse, parent, or child of an individual who died or was disabled as a direct result of the September attacks.**

(A) **Have regulations implementing this provision been implemented?**

(B) **How many applications for relief under this provision has the INS received?**

(C) **How many applications for relief under this provision has the INS granted?**

(D) **What sorts of relief is the INS granting under this provision?**

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 90. **Section 426 of the Act directs the Attorney General to establish evidentiary guidelines for death, disability, and loss of employment or destruction of business in connection with the provisions of this subtitle.**

(A) **Has the Attorney General promulgated regulations for use in accordance with section 426 of the Act?**

(B) Does the Attorney General plan to promulgate regulations for implementation of this provision?

(C) Has the Attorney General established standards under section 426 of the Act? In what form (guidelines, operating instructions, guidance memoranda) are those standards set forth? Please provide a copy of those standards.

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 91. Section 427 of the Act prohibits benefits to terrorists or their family members. Have any family members of the terrorists responsible for the September terrorist attacks attempted to file for benefits under the Act?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 92. Section 806 authorizes the Department of Justice to use its civil asset seizure authority to seize assets of terrorist organizations. Has the Department of Justice used this power? If so, what is the status of the seized assets? Have any seizures under this section been challenged in court? If so, what was the result? What procedures are in place to prevent this power from being abused when, for example, assets allegedly involved in domestic terrorism are seized prior to prosecution of the alleged terrorists?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Leahy 93. Section 1001 of the Act requires the Department of Justice Inspector General to collect and investigate complaints of civil rights and civil liberties abuses by Department of Justice employees and to publicize his responsibilities. How many such complaints have been received? How many investigations have been initiated? What is the status of those investigations? In what ways has the Inspector General publicized these responsibilities?

Answer: In response to your request, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002 and August 26, 2002.

Senator Richard J. Durbin

Durbin 1. **On September 15, 2001, at the request of the Bureau of Alcohol, Tobacco and Firearms (ATF), the Federal Bureau of Investigation (FBI) checked the names of certain individuals believed to be of interest to the September 11th investigation against the NICS Audit Log.**

How many names did the ATF request that the FBI check against the NICS Audit Log as part of this request on September 15, 2001?

Answer: 186.

Durbin 2. **Did the ATF's request on September 15, 2001, contain any information concerning whether the ATF thought that any of these individuals were prohibited by law from receiving or possessing firearms?**

Answer: No.

Durbin 3. **On September 15, 2001, did the FBI have any information concerning whether any of these individuals were prohibited by law from receiving or possessing firearms?**

Answer: No. The FBI NICS took no steps to determine whether any of the individuals were prohibited before running the names against the Audit Log of Approved Transfers.

Durbin 4. **At some point after checking the names of at least 186 individuals believe to be of interest to the September 11th investigation, the FBI suspended this use of the NICS Audit Log while it considered the legality of these checks. Did the FBI suspend these checks on its own, or was the FBI instructed to suspend these checks?**

Answer: After the 186 names were searched, the FBI NICS suspended the use of the NICS Audit Log of Approved Transfers for this purpose and consulted with the FBI General Counsel's Office and the Department of Justice on the applicable legal authority.

Durbin 5. **What conclusion did the FBI reach concerning the legality of this use of the NICS Audit Log? Please attach any materials (memoranda, letters, etc.) reflecting the FBI's consideration of this issue and its conclusion concerning the legality of this use of the NICS Audit Log.**

Answer: Upon examination of legal authorities, the FBI determined that such checks of the NICS Audit Log of Approved Transfers was governed by the provision in the NICS regulation which states "information in the NICS Audit Log pertaining to allowed transfers may be accessed directly only by the FBI for the purpose of conducting audits of the use and performance of the NICS." 28 C.F.R. 25.9(b)(2). The FBI consulted with the Department of Justice regarding the FBI's conclusion which led to an Office of Legal Counsel (OLC) opinion, dated October 1, 2001, setting forth the Department's legal position on this issue. The Department has substantial confidentiality interests in the internal deliberations that lead to such legal positions and therefore declines to provide documents reflecting such deliberations. Ordinarily, the OLC opinion would also be considered a confidential internal advice document, but in this instance the FBI NICS provided the opinion to the General Accounting Office (GAO). We understand that the GAO provided your office with a copy of the OLC opinion and refer you to that opinion for the Department's legal analysis and conclusion on this issue.

Durbin 6. **Did the FBI violate the law by checking the names of certain individuals believed to be of interest to the September 11th investigation against the NICS Audit Log on September 15, 2001?**

Answer: As noted above, further checks were suspended until the applicable legal authority was clarified.

Durbin 7. **On October 1, 2001, the Department of Justice's Office of Legal Counsel (OLC) issued a memorandum which concluded that there is "...nothing in the NICS regulations that prohibits the FBI from deriving additional benefits from checking audit log records as long as one of the genuine purposes for which the checking is carried out is the permitted purpose of auditing the use of the system." When you appeared before this Committee on December 6, 2001, you testified that "the only permissible use for the National Instant Check system is to audit the maintenance of that system." You also testified that current law "outlaws and bans... the use of approved purchase records for weapons checks on possible terrorists or anyone else." On July 25, 2002, you testified that OLC's conclusion was "consistent" with your testimony on December 6, 2001.**

When did you become aware of the existence of the OLC memorandum?

Answer: The Attorney General was aware of the OLC opinion prior to his December 6, 2001 testimony.

Durbin 8. Why didn't you disclose the existence and conclusion of the OLC memorandum on December 6 to the Committee if it was "consistent" with your testimony?

Answer: It was neither necessary nor appropriate to refer to internal, confidential legal advice in answering the question on December 6.

Durbin 9. Did the FBI resume checking the names of certain individuals believed to be of interest to the September 11th investigation against the NICS Audit Log after the OLC issued this legal opinion?

Answer: No.

Durbin 10. During your testimony on July 25, 2002, you noted that "If there are incidental law enforcement items that flow from the auditing, under the Brady law, then those can take place." Did you discuss the "incidental law enforcement" usages of NICS records during your testimony on December 6?

Answer: The full testimony on July 25, 2002, is as follows: "My opinion is that the authority to use those records is for audit purposes and incidental things discovered in the audit for law enforcement may be pursued, but you cannot use those records for purposes other than auditing." Under governing regulations, "[i]nformation in the NICS Audit Log pertaining to allowed transfers may be accessed only by the FBI for the purpose of conducting audits of the use and performance of the NICS." 28 C.F.R. 25.9(b)(2). This regulation effectuates the twin commands of the Brady Act that the FBI "destroy all records of the system" relating to approved transactions, 18 U.S.C. 922(t)(2)(C), and that the Attorney General "ensure the privacy and security" of the system, 18 U.S.C. 922 (Statutory Note). Accordingly, statutory authority for retaining records of approved transactions extends only to the limited purpose of auditing the system to ensure its privacy, security, and proper performance. See, e.g., NRA v. Reno, 216 F.3d 122, 137-38 (2000), cert denied sub nom. NRA v. Aschroft, 121 S. Ct. 150 (2001) (noting that maintenance of the Audit Log of Approved Transfers is limited "to the minimum reasonable period for performing audits on the system"). Consistent with this settled interpretation of the Brady Act, I testified on December 6 that "the only recognized use now of approved purchaser records is limited to an auditing function. . . . And I believe that the law prohibits, in its current

state, any other use of approved purchaser records. That's a subcategory of data used by the FBI."

In a memorandum obtained by the General Accounting Office ("GAO") in connection with a report that you requested, entitled "Gun Control: Potential Effects of Next-Day Destruction of NICS Background Check Records, GAO-02-653," the Office of Legal Counsel opined: "Assisting criminal investigations generally is not one of the purposes for which the NICS regulations authorize the FBI to use audit log records. Nonetheless, we see nothing in the NICS regulations that prohibits the FBI from deriving additional benefits from checking audit log records as long as one of the genuine purposes for which the checking is carried out is the permitted purpose of auditing the use of the system." OLC noted that "if the FBI finds a record showing an allowed transfer to a prohibited person," then that record, discovered through a genuine audit, can be provided to the appropriate law enforcement agency, i.e. the ATF. In context and undistorted, this opinion is perfectly consistent with my December 6 testimony and the Department's position: The NICS Audit Log of Approved Transfers may be accessed only if there is a genuine audit purpose, but once properly accessed, information obtained from such audits may be used to further other law enforcement needs.

Durbin 11. According to the General Accounting Office (GAO) report I commissioned, on October 17, 2001, the Office of Legal Policy (OLP) informed the FBI that "...DOJ was reviewing the legal opinion and instructed the FBI to refrain from accessing information in the NICS audit log for investigatory purposes pending the outcome of the review."

Who asked the OLP to review the OLC opinion?

Answer: The OLC opinion was requested by and addressed to the Office of Legal Policy ("OLP"). Upon receipt, OLP carefully studied the opinion so that it could evaluate the various activities of FBI NICS in accessing the NICS Audit Log of Approved Transfers.

Durbin 12. Does the OLP review all opinions issued by the OLC?

Answer: OLP frequently relies upon the legal opinions of OLC in assessing Department policies and proposals.

Durbin 13. Why did OLP undertake a review if OLC had already concluded that the FBI could use NICS Audit Log records to determine whether at least some of the September 11 detainees successfully purchased firearms in this country? As you know, OLC noted that "checking the names of prohibited persons

constitutes 'support[ing] audits of the use of the system' within the meaning" of existing law.

Answer: The FBI NICS never received a request by any investigator to check the names of September 11th detainees against the NICS Audit Log of Approved Transfers. Having requested and received the OLC opinion, OLP relied on it to evaluate the various activities of FBI NICS in accessing the NICS Audit Log of Approved Transfers.

Durbin 14. According to the GAO report, in late December 2001, the OLP notified the FBI that it could search the NICS Audit Log to determine, in the context of an audit, whether known prohibited individuals successfully purchased guns in this country. Please attach any materials reflecting this notification.

Answer: In late December 2001, OLP responded to a question raised by the FBI on whether it could check a known prohibited person against the Audit Log of Approved Transfers in connection with a Merit Systems Protection Board proceeding regarding a Bureau of Prisons ("BOP") employee who obtained a firearm after being convicted of a misdemeanor crime of domestic violence, a prohibited category under 18 U.S.C. 922(g)(9). The employee had purchased a gun and argued in the proceeding that because he had been given a "proceed" response by a NICS Point of Contact state when buying the gun, he could not be considered a prohibited person. The FBI was asked by BOP to check to determine whether the NICS "proceed" response had been given in error and, if so, to provide an affidavit to that effect. After consulting with OLC, OLP orally advised the FBI NICS that checking the Audit Log of Approved Transfers for this purpose was permissible because doing so was an audit of the performance of the NICS.

Durbin 16. According to GAO, the Office of Legal Policy concluded in late-December 2001 that "consistent with the legal opinion, a search of information in the NICS audit log could be conducted with regard to known prohibited persons for auditing purposes." On July 25, 2002, you testified that "...incidental things discovered in the audit for law enforcement may be pursued, but you cannot use those records for purposes other than auditing." If the FBI could verify that any of the September 11 detainees were known prohibited persons under federal law, what would prevent them from auditing the system to determine if any of these individuals attempted to purchase firearms prior to, or shortly after, September 11, 2001?

Answer: As noted in the OLC opinion, the checking of audit log records on known prohibited persons is permissible only "as long as one of the genuine purposes for which the checking is carried out is the permitted purpose of auditing the use of the system."

Durbin 17. Would such searches enhance the FBI's capacity to enforce existing gun laws and prevent domestic terrorism?

Answer: Audits of the use and performance of the NICS, consistent with applicable laws and regulation, are intended to ensure that the NICS operates in a manner that fully implements all the requirements of the Brady Act and the Gun Control Act.

Durbin 18. Do you agree with OLC's conclusion that NICS records can be utilized to determine whether some of the September 11 detainees attempted to purchase firearms in this country, if those detainees are known prohibited persons?

Answer: We agree with the OLC opinion that: "Assisting criminal investigations generally is not one of the purposes for which the NICS regulations authorize the FBI to use audit log records. Nonetheless, we see nothing in the NICS regulations that prohibits the FBI from deriving additional benefits from checking audit log records as long as one of the genuine purposes for which the checking is carried out is the permitted purpose of auditing the use of the system."

Durbin 19. Under current regulations, approved purchaser records can be maintained for up to 90 days. In practice, however, DOJ purges these records after 80 days to maintain 10 full days of backup data. When OLP reached its conclusion in late-December 2001 that a search of information in the NICS Audit Log could be conducted with respect to known prohibited persons, however, more than 90 days had passed since the September 11 detainees would have purchased firearms (which would have occurred at some point prior to September 11, 2001, or shortly thereafter). What did the OLP expect the FBI to find if the 90-day period for the retention of approved purchaser records had expired and the records had been destroyed?

Answer: The FBI NICS never received a request by any investigators to check the names of September 11th detainees against the NICS Audit Log of Approved Transfers.

Durbin 20. Is it reasonable to conclude that we may never know if some of the individuals detained after September 11 successfully purchased firearms for

terrorist organizations in this country because the Department of Justice did not authorize the FBI to make this determination until after the 90-day records retention period expired?

Answer: The FBI NICS never received a request by any investigators to check the names of September 11th detainees against the NICS Audit Log of Approved Transfers.

Durbin 21. **In the report I released on July 23, 2002, GAO found that during the first six months of the current 90-day retention policy, the FBI used the retained records to initiate 235 firearm retrieval actions. Of that number, 97% or 228 illegally obtained firearms approved by NICS could not have been retrieved had DOJ's next-day destruction policy been law. Moreover, GAO concludes that "The FBI generally would not have been able to initiate these retrieval actions under DOJ's proposed option," or corrective remedy.**

Now that the GAO has concluded that DOJ's proposal will hamper the effective enforcement of existing gun laws and that DOJ's corrective remedies are inadequate, will you withdraw this proposal? As you know, GAO reached the following conclusion regarding DOJ's proposed option to address the problems this proposal creates: "The FBI generally would not have been able to initiate these retrieval actions under DOJ's proposed option of retaining the dealer's identification number but not retaining personal identifying information about the respective purchaser."

Answer: The Department's view on this matter was set forth in the Department's letter to the GAO, reprinted in its report at page 34:

> Although most of the issues raised in the draft report were anticipated by the Notice of Proposed Rulemaking, National Instant Criminal Background Check System, 66 Fed. Reg. 35567 (July 6, 2001), or will be addressed in the final rule, I will discuss here the GAO's primary concern that, under the proposed rule, the FBI would be unable to initiate firearms retrievals in cases where a transaction had been erroneously approved. In a small number of cases (240 out of 2.5 million checks, or .0096 percent), the state or local reporting agency will clear the NICS to approve a transaction, only to notify the NICS more than 24 hours later that its prior communication was in error.
>
> As I wrote to you on May 14, 2002, this problem stems from incomplete or inaccurate state criminal history records and will diminish as the states improve their criminal record systems. To that end, the Department's National Criminal History Improvement Program

(NCHIP) has awarded nearly $40 million in FY 01 and will award $39 million in FY02 to the states to improve their record systems. For FY03, the President's budget requests $63 million for this purpose. The Attorney General has directed the Bureau of Justice Statistics to study and recommend ways to target these grants to improve the accuracy of state criminal history records, as well as records relating to adjudicated mental incapacity and domestic violence.

Nevertheless, in the transitional period while the states perfect their record systems, the Department seeks to ensure that firearms transferred erroneously are properly retrieved. One option under consideration is, for each transaction, to retain the Federal Firearms Licensee number for 90 days as well as the NICS Transaction Number ("NTN") and date of the transaction, which are kept indefinitely. When a state agency provides information showing that a proceed was given in error, the FBI can use the NTN and date to trace the transaction to the licensee and refer the transaction to the Bureau of Alcohol, Tobacco and Firearms ("ATF") to initiate a firearm retrieval. The licensee is required to retain ATF Form 4473, Firearms Transaction Record, which provides information on the purchaser and transaction that ATF would use to retrieve the firearm. This option, and others under consideration, would both effectuate the Brady Act's requirement that the FBI "destroy all records of the system" relating to personally identifiable consumer information of approved transfers and facilitate ATF follow-up to ensure effective enforcement of the Gun Control Act.

Your report acknowledges that this option, if adopted, would enable the FBI to identify and, where appropriate, to refer erroneous transfers to the ATF to initiate a firearm retrieval. However, your report asserts that this option is only a partial solution because it would not allow the FBI to "determine if the audit log contains prior records of allowed transfers for the same individual that also should have been denied." Draft Report at 11 (emphasis added). We note, however, that once the FBI has referred for retrieval an erroneous firearm transfer to a prohibited person, ATF is not limited in its investigation to that particular transaction and has ample investigative avenues (beyond the audit log) to determine whether the prohibited person has other firearms which he illegally possesses. Keep in mind that the ATF not only retrieves erroneously transferred firearms, but also enforces the federal ban on possession of any firearms by prohibited persons. Thus, contrary to the conclusion of your report, under the option described above, the ATF would be able to undertake retrieval of all firearms erroneously transferred to the prohibited person and, indeed, other firearms that he illegally possesses.

Letter dated June 24, 2002, from Viet D. Dinh, Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice, to Laurie Eckstrand, Director of Justice Issues, General Accounting Office.

Durbin 22. If not, when do you plan to issue a final rule?

Answer: The Department is reviewing comments made in response to the Notice of Proposed Rulemaking and does not have a planned timetable for completion of this review process.

Durbin 23. What statutory authority does DOJ have to maintain the firearms dealer's identification number if the purpose of retaining the firearms dealer's identification number is to ultimately obtain access to approved purchaser records for up to 90 days?

Answer: The Department's authority under the Brady Act to retain in the Audit Log information on allowed transfers, including the firearm's dealer identification number, was upheld in National Rifle Ass'n v. Reno, 216 F.3d 122 (D.C. Cir. 2000), cert. denied sub nom. National Rifle Ass'n v. Ashcroft 121 S. Ct. 150 (2001). Moreover, the Department interprets the provision of the Brady Act requiring the destruction of "all records of the system relating to the person or the transfer," 18 U.S.C. 922(t)(2)(C), as referring to records that contain identifying information about individual purchasers or transfers.

Durbin 24. Is it your view that the current 90-day retention policy cannot be supported by the Brady Law?

Answer: The proposed change to the current 90-day retention policy is intended to implement faithfully the twin commands of the Brady Act that the FBI "destroy all records of the system" relating to approved transactions, 18 U.S.C. 922(t)(2)(C), and that the Attorney General take appropriate steps to "ensure the privacy and security" of the system, 18 U.S.C. 922 (Statutory Note). The proposed rule implements these statutory directives and fulfills the Department of Justice's commitment, originally stated in1998, to "work toward reducing the retention period to the shortest practicable period of time less than six months that will allow basic security audits of the NICS." 63 Fed. Reg. 58304 (Oct. 30, 1998).

Durbin 25. In its report, GAO notes that an average of 34 calendar days elapsed between the FBI's initial decision to allow a firearm transfer to proceed and the date the FBI reversed the proceed to a denial. Moreover, the data GAO presents (the chart in that GAO report is reproduced on the next page) in its study suggests that the number of proceeds subsequently reversed to denials does

not decrease appreciably as the 90-day time limit for maintaining the records approaches. In other words, the GAO's data provides evidence that there would be many more firearm retrievals after 90 days if the regulations allowed for a longer retention period.

A retention period longer than 90 days would enable law enforcement to keep more illegal firearms out of the hands of felons, fugitives, stalkers, wife beaters and terrorists. What is your response to the data in the GAO report suggesting that a retention period of longer than 90 days would enhance law enforcement's ability to keep more illegal firearms out of the hands of criminals?

NUMBER OF CALENDAR DAYS TAKEN TO IDENTIFY NICS PROCEED TRANSACTIONS THAT WERE LATER DENIED
(July 3, 2001 - January 2, 2002)

	Transactions		Cumulative Transactions	
Days	**Number**	**Percent**	**Number**	**Percent**
Less than 1 day	7	3%	7	3%
1 to 10 days	46	20%	53	23%
11 to 20 days	37	16%	90	38%
21 to 30 days	26	11%	116	49%
31 to 40 days	26	11%	142	60%
41 to 50 days	33	14%	175	74%
51 to 60 days	17	7%	192	82%
61 to 70 days	25	11%	217	92%
71 to 80 days	18	8%	235	100%
TOTAL	**235**	**100%**	----	----

**In order to maintain 10 full days of backup data without violating the 90-day retention period, NICS purges all approved records from the online system after 80 days.*

Answer: While it is conceivable that keeping the records on approved purchasers longer, or even indefinitely, could allow the system to discover some additional cases of persons who should not have obtained a gun, we do not believe that doing so would be faithful to the Brady Act's command that the NICS "destroy all records of the system relating to approved transactions." The retention period was reduced to 90 days by the last Administration pursuant to a commitment by then-Attorney General Reno that the Department would "work toward reducing the retention period to the shortest practicable period of time less than six months that will allow basic security audits of the NICS." 63 Fed. Reg. 58304 (Oct. 30, 1998). Moreover, as the Department explained in its response to the GAO, we believe that the option under consideration of temporarily retaining the FFL number along with the NICS transaction number will address the problem of "proceed" responses later discovered to have been given in error.

Senator Feingold

Feingold 1. During the hearing on July 25th, I asked you about the detention of material witnesses and the use of Rule 46(g) of the Federal Rules of Criminal Procedure. Specifically, I asked if the Justice Department has complied with the affirmative requirements of the rule. Rule 46(g) requires a prosecutor to submit a bi-weekly report to the court of the reasons why the witness, who is being held for more than 10 days pending indictment or trial, should not be released or have his or her testimony taken by video deposition, and the reasons why the witness is still held in custody. You indicated that all orders and rules of the court had been complied with.

(a) At the hearing, I requested copies of all reports submitted pursuant to Rule 46 (g) and now reiterate that requires. Please provide copies of all reports submitted pursuant to Rule 46(g) relating to individuals detained as material witnesses in connection with the Department's September 11th investigation.

Answer: Please see response to Senator Leahy's Question 21.

(b) How many individuals are currently being detained in any state, federal or military facility as a material witness in connection with the events of September 11, 2001, or terrorism generally?

Answer: Please see response to Senator Leahy's Question 21.

(c) How many of the detained material witnesses are represented by counsel?

Answer: All material witnesses held in custody are entitled to counsel and, if they qualify financially, will have counsel appointed for them by the court. See 18 U.S.C. 3006A(a)(1)(g).

(d) For each individual detained in any federal or military facility as a material witness, have bi-weekly reports pursuant to Rule 46(g) been submitted to the appropriate Court? If not, why not and how many reports have been filed?

Answer: No. As an initial matter, we believe that a plain reading of Rule 46(g) indicates that biweekly reports are not mandated for material witnesses held for grand jury investigations. Nevertheless, to satisfy the protections afforded a detained witness by Rule 46(g), courts that have overseen grand juries in connection with the PENTBOMB investigation have set status hearings for all material witnesses at the time each is initially ordered detained by the court. We are unaware of any case in which a material witness has been held at any time without representation by counsel or without the court being apprised of the status of the witness, either through court conferences or court filings by the parties. More than one status hearing would be held for material witnesses detained for an extended period of time.

(e) How many of the detained material witnesses have been provided with an opportunity to testify before a federal or state grand jury?

Answer: The purpose of the material witness warrant is to obtain information that the witness may have which is material to the Grand Jury investigation by requiring the witness, if necessary, to appear before the Grand Jury. However, such testimony is often pretermitted if the witness provides an interview or proffer, or if further investigation establishes that the testimony is no longer necessary. We do not provide details about how material witness matters are resolved because of grand jury secrecy requirements and to prevent dissemination of criminal investigative information.

(f) How many of the detained material witnesses have, in fact, testified before a federal or state grand jury?

Answer: See response to 1(e) above.

(g) Have all witnesses been provided with an opportunity to testify? Ifnot, why not?

Answer: See response to 1(e) above.

(h) How many of the detained material witnesses have been provided with an opportunity to have their testimony taken by video deposition?

Answer: See response to 1(e) above.

(i) How many of the detained material witnesses have had their testimony actually taken by video deposition?

Answer: See response to 1(e) above.

(j) For the material witnesses described above, please provide copies of any written decisions, opinions, and rulings issued by any court with respect to the use of Rule 46(g).

Answer: N/A. Reporting requirements have been satisfied by court-ordered status hearings.

Feingold 2. You testified at the hearing that only two U.S. citizens are presently being detained as enemy combatants Jose Padilla and Yasser Hamdi.

(a) Other than Padilla, has the Justice Department considered recommending transferring any other U.S. citizens from civilian to military custody?

Answer: It would be inappropriate for the Department to disclose its internal deliberations on this subject.

(b) If yes, how many people have been considered for transfer to military custody?

Answer: It would be inappropriate for the Department to disclose its internal deliberations on this subject.

(c) If yes, what change in circumstances has caused the decision to transfer individuals from civilian to military custody?

Answer: The Executive Branch has not transferred anyone other than Padilla from civilian to military custody.

(d) Is the Administration currently considering changing the status of any individuals being held as material witnesses to 'enemy combatant' status?

Answer: It would be inappropriate for the Department to disclose its internal deliberations on this subject. In addition, the grand jury secrecy rule (Fed. R. Crim. P. 6(e)) and orders sealing all proceedings relating to material witnesses preclude us from providing any information about individuals so held.

(e) If yes, how many individuals and on what basis would the Administration do so?

Answer: See above response.

(f) Is the Administration currently considering charging any individuals being held as material witnesses with criminal charges or immigration charges?

Answer: See above response.

(g) If yes, how many individuals and what criminal or immigration charges are being considered?

Answer: See above response.

(h) Describe what if any review process has been instituted to ensure that detained individuals, including 'material witnesses', have been held on sufficient evidence? What standard of proof has been used in determining if there is sufficient evidence?

Answer: The standard for detaining a material witness is set forth in 18 U.S.C. 3144. A judicial officer cannot issue a warrant for the witness's arrest unless the govemment establishes by affidavit that his testimony is "material in a criminal proceeding" and that it may become "impractical" to secure his presence by subpoena." Following the witness's arrest, the court employs the standards set forth in the Bail Reform Act, 18 U.S.C. 3142, to determine whether to detain the witness pending his testimony. Under the Bail Reform Act, a witness will be detained if the government establishes that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. 3142(e).

If a person is arrested on a criminal charge prior to return of the indictment, the individual is entitled to a prompt hearing before a judicial officer at which the government will have to establish that the charge is supported by probable cause. Fed. R. Crim. P. 5(a). The return of an indictment, which constitutes a probable cause determination by the grand jury, dispenses with

this requirement. Nevertheless, if the government wishes to detain a defendant pending trial, it must satisfy the conditions of the Bail Reform Act, set forth above.

Feingold 3. According to media reports, as of November 2001, the Justice Department had detained close to 1,200 non-US nationals.

(a) What is the total number of individuals who have been at any time detained in connection with the September 11th investigation?

Answer: Although there have been press reports that the Department of Justice had detained close to 1,200 aliens in the aftermath of September 11th, we believe that number actually referred to the total number of individuals at that time who had been detained for brief periods for the purpose of questioning by federal, state and local law enforcement following September 11th, as well as the number of individuals who were detained for immigration proceedings, criminal proceedings, and grand jury proceedings. The Department has stated previously that we do not have an ability to track the total number of individuals questioned during the investigation. However, as of February 10, 2003, 766 individuals had been detained on immigration violations in connection with September 11th investigations.

(b) Of that number, how many are still in detention? Of those currently detained, please list the status of their detention, including, but not limited to the following categories: material witness, enemy combatant, immigration hold, criminal hold, sentenced prisoner, no charges, and state or local charges.

Answer: As of February 10, 2003, of the 766 persons detained on immigration violations, 29 individuals were still in Immigration and Naturalization Service custody. Regarding material witnesses, it is the Department's position that disclosure of the total number of persons held as material witnesses could needlessly reveal important information about the progress and scope of the investigation into the September 11th attacks. As we have noted on other occasions, all persons held as material witnesses are informed of their right to counsel, and provided with counsel at the government's expense if they cannot afford their own counsel, for the duration of their detention and their detention is reviewed by federal judges in the district in which they are held. As of February 6, 2003, the Justice Department had charged 134 individuals with criminal violations, 101 had been found guilty, either through trials or please. As of January 31, 2003, 56 individuals were still in custody awaiting sentencing, removal or trail. The Department does not have an ability to track the number of individuals detained on state or local charges.

Feingold 4. (a) Some have raised a concern that deported detainees could be subject to re-arrest in the detainees' destination country. What information does the Justice Department have concerning the status of detainees deported?

Answer: Neither the Department of Justice nor the Department of Homeland Security, which executes removal orders, tracks the status of aliens after they have been removed from the United States. However, in immigration proceedings, aliens have an opportunity to apply for relief including asylum, withholding of removal and Convention Against Torture protections from removal to countries where they may be subjected to persecution or torture.

(b) How many individuals have been deported and to what countries have they been sent from the United States?

Answer: As of February 10, 2003, 489 individuals have been removed to 43 countries. A list of countries is attached.

Feingold 5. (a) Please explain the legal justification for continuing to hold individuals on immigration charges who have agreed to voluntarily depart the country or who have been ordered deported yet remained detained after the 90 days that the U.S. has to effectuate their departure.

Answer: Under Zadvydas v. Davis, 533 U.S. 678 (2001), there is a presumptively reasonable six-month period in which aliens may be detained after a removal order becomes final while the government attempts to effect removal. In Zadvydas, the Supreme Court further distinguished the circumstances in which detention beyond the 90-day removal period outlined in Section 241(a)(1)(A) of the Immigration and Nationality Act (INA), stating "we [do not] consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." Id. at 696. Moreover, every removal of an alien necessarily involves an act affecting foreign policy because it requires sending the alien to another country. In some cases, the foreign policy implications of that act may be significant. Thus, where additional time is necessary to provide the opportunity to obtain or communicate information bearing upon the broader considerations of foreign policy or national security law that underlie and are directly and integrally related to the enforcement of immigration laws, the delay of the alien's departure may be justified.

(b) Attorneys and detainees have been told that a "FBI clearance" process is in effect. What is this clearance process and what basis in law or regulation does it have?

Answer: Following the events of September 11th, the United States government launched an extensive, broad-based and worldwide investigation into the terrorist attacks and into threats, conspiracies, and attempts to perpetrate terrorist acts against United States citizens and interests. As part of this investigation, law enforcement, including the Federal Bureau of Investigation (FBI), questioned thousands of individuals. Some interviews resulted in a decision to detain individuals who had violated immigration laws. Although these alien detainees were held by the former Immigration and Naturalization Service (INS) on immigration-related charges, they were originally questioned because there were indications that they might have connections with, or possession in formation pertaining to, terrorist activity against the United States including particularly the September 11th attacks and the individuals and organizations which perpetrated them. As related to those alien detainees for whom investigative concerns remained at the time they were taken into INS custody, law enforcement efforts have continued to resolve those concerns, and in all but a few instances those concerns have been resolved. Efforts by law enforcement agencies such as the FBI to coordinate with INS to determine whether investigative concerns exist regarding detainees are consistent with the broader consideration of national security that is inherent in the enforcement of immigration laws and the protection of our nation's borders. It is the Department's position that disclosure of the specific methods by which law enforcement agencies evaluate whether an individual presents an investigative concern is sensitive information which could needlessly reveal the conduct of the terrorism investigation itself.

Feingold 6. **In your opening statement at the hearing, you said that before September 11th, FBI agents "were forced to blind themselves" to information readily available to the general public unless they were investigating a specific crime. Please describe what specific information in the public domain during the last 20 years the FBI blinded itself to that resulted in a failure to arrest or to prosecute any individual?**

Answer: The Department's previous guidelines only authorized investigative activities relating to particular crimes or criminal enterprises, initiated on the basis of information coming to the FBI from external sources which established the predication for such investigative activity. Thus, the FBI was otherwise largely barred from engaging in proactive activities to gather information for counterterrorism purposes or other law enforcement purposes, even where such information was fully available to members of the public generally.

For example, unless a lead happened to come to the FBI suggesting that evidence of criminal activities might be found at certain locations on the Internet, there was no authorization to surf the Internet to identify public sites and forums in which terrorist activities or other

criminal activities are openly carried out. The revised investigative guidelines which were developed following the September 11 terrorist attack rejected this type of limitation as inconsistent with the effective protection of the public from terrorism and other crimes. The change was reflected in the addition of a new part VI to the guidelines, which provided new information gathering authorizations and explained their rationale as follows:

> In order to carry out its central mission of preventing the commission of terrorist acts against the United States and its people, the FBI must proactively draw on available sources of information to identify terrorist threats and activities. It cannot be content to wait for leads to come in through the actions of others, but rather must be vigilant in detecting terrorist activities to the full extent permitted by law, with an eye towards early intervention and prevention of acts of terrorism before they occur. This Part accordingly identifies a number of authorized activities which further this end, and which can be carried out even in the absence of a checking of leads, preliminary inquiry, or full investigation as described in Parts I-III of these Guidelines. The authorizations include both activities that are specifically focused on terrorism . . . and activities that are useful for law enforcement purposes in both terrorism and non-terrorism contexts . . . .

Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, Part VI.

The specific information gathering authorizations in Part VI which had no counterpart in the previous guidelines include the following: "(i) operating and participating in counterterrorism information systems, such as the Foreign Terrorist Tracking Task Force (VI.A(1)); (ii) visiting places and events which are open to the public for the purpose [of] detecting or preventing terrorist activities (VI.A(2)); (iii) carrying out general topical research, such as searching online under terms like 'anthrax' or 'smallpox' to obtain publicly available information about agents that may be used in bioterrorism attacks (VI.B(1)); [and] (iv) surfing the Internet as any member of the public might . . . to identify, e.g., public websites, bulletin boards, and chat rooms in which bombmaking instructions, child pornography, or stolen credit card information is openly traded or disseminated, and observing information open to public view in such forums to detect terrorist activities and other criminal activities (VI.B(2)) . . . ." Guidelines, Introduction, Paragraph D.

Feingold 7. What is the status of the study on racial and geographic disparities in the federal death penalty system that Attorney General Reno ordered and that in June 2001 you agreed to continue? When can we expect the Justice Department to act on proposals and decide which researchers will be awarded contracts to conduct the research?

Answer: In July, 2001, the National Institute of Justice, the research, development, and evaluation arm of the Justice Department, issued a solicitation seeking applications proposing to conduct research on the manner in which homicide cases come into the federal system. The solicitation contemplated that the research would attempt to identify factors that explain the geographic distribution and racial/ethnic composition of federal capital cases. The solicitation indicated that NIJ would make one to three awards of varying amounts up to a total of $1,000,000.

Seven applications were timely submitted in response to the solicitation. Following a peer review of all applications by researcher and practitioner experts, NIJ Director Sarah Hart selected two proposals to be funded. The proposals funded were:

> (1) Justice Studies, Inc., "Investigation and Prosecution of Homicide Cases in the U.S.: The Process of Federal Involvement," with the grant period lasting from July 1, 2002 to June 30, 2004 and a total cost of $ 643,349; and
>
> (2) RAND Corporation, "Investigation and Prosecution of Homicide: Examining the Federal Death Penalty System," with the grant period lasting from October 1, 2002 to March 31, 2005 and a total cost of $1,332,979.

The total amount of NIJ funding is $1.976 million, almost twice the amount initially set aside for the solicitation. NIJ Director Hart determined to increase the funding for this research in order to fund two studies on this issue, each of which proposes to address the issue from different perspectives using different data sets. The Justice Studies, Inc. proposal will examine the manner in which Federal and State investigators and prosecutors decide where to bring a capital case and when to seek the death penalty. The RAND Corporation study will examine over 900 federal cases in which the death penalty could have been sought in order to identify the factors that contributed to the prosecutorial decision made in those cases concerning this punishment.

NIJ staff worked with the Justice Department Capital Case Unit staff to ensure that once the researchers were selected to conduct these studies, procedures would be in place to enable the researchers to obtain the necessary data from the DOJ death penalty case files yet at the same time protect the confidentiality of victims and witnesses identified in those files.

The Justice Department has previously conducted two internal reviews of death penalty cases. Both studies concluded that there had been no bias in the manner in which the death penalty was implemented.

Feingold 8. (a) Have there been any efforts by the Justice Department to require that immigrants who receive new Social Security numbers are assigned a distinctly immigrant Social Security number? For example, would immigrants be given a number that begins with a specific series of numbers relating to their country of origin or some other marker?

Answer: No. The Social Security Administration assigns numbers sequentially based on State of residence, not on nationality or any other characteristic.

(b) If there is such an effort, please explain the Department's basis for creating a Social Security numbering system that singles out immigrants for special numbers or other identifiers.

Answer: *N/A*

(c) Would an immigrant's Social Security number be changed if he or she became a U.S. citizen?

Answer: Question #8, particularly parts (c) thru (f) should be directed to the Social Security Administration (SSA). The Department of Justice has no information regarding altering current SSA procedures.

(d) Would there be a database maintained for immigrants that would contain cumulative information relating to immigrants based upon their country of origin?

Answer: Please see 8(c) above.

(e) Who would have access to the Social Security information?

Answer: Please see 8(c) above.

(f) What protections would be offered to immigrants to ensure that future employers would not discriminate against them based upon the information contained in their Social Security numbers?

Answer: Please see 8(c) above.

Senator Biden

Biden 1. **Two and a half weeks ago, the President directed you to establish a Corporate Fraud Task Force. The President's July 9 Executive Order instructed the Deputy Attorney General to provide you with, "recommendations for allocation and reallocation of resources of the Department of Justice for investigation and prosecution of significant financial crimes".**

Why aren't you a member of the Task Force? Has the Task Force provided you with any recommendations to date? If so, what are they? Do you anticipate having to dedicate any new resources to the Task Force? Are you concerned that Deputy Attorney General Thompson's involvement in pending ERISA fraud litigation could inhibit the operations of the Task Force?

Answer: The vigorous enforcement of the laws against economic crimes is one of the top priorities of the Department, standing behind only our efforts in the war against terrorism. We are dedicated to rooting out corporate fraud and restoring the confidence of America's investors in the transparency and honesty of business and the markets. The Department has focused intensely on this effort with impressive results. We have successfully prosecuted Arthur Andersen LLP for obstructing justice and secured the arrest or indictment of executives at WorldCom, Adelphia, Enron, Health South, ImClone, Qwest, Kmart, Dynegy, El Paso Corporation, American Tissue, Symbol Technologies, Anicom, Peregrine Systems, Homestore.com, RiteAid, Mercury Finance, Commercial Financial Services, Aura Systems, Motor Car Part and Accessories, and many other companies on fraud charges. Our prosecutors have been hard at work, obtaining convictions of more than 7,000 white collar defendants in fiscal year 2001 and more than 7,500 white-collar defendants in fiscal year 2002.

The Department participated throughout the corporate accountability legislative effort by providing analysis and assistance in preparing the President's proposals to Congress. As you are aware, the Administration made numerous comments and proposals to Congress throughout the process, and these were prepared in consultation with the Department. In addition, the Department provided three witnesses to testify during June and July 2002 in the Senate Judiciary Committee's Subcommittee on Crime and Drugs concerning the Department's recommendations on white-collar criminal matters. On June 19, 2002, United States Attorney for the Southern District of New York James Comey testified before that subcommittee and provided the Department's views on appropriate punishments in white collar cases. On July 10, 2000, Assistant Attorney General for the Criminal Division Michael Chertoff and United States Attorney for the District of Montana William Mercer testified before that subcommittee to further express the Department's views on white collar criminal enforcement and to comment

specifically on corporate fraud enforcement. We hope that these views were considered in increasing the statutory maximum penalties for several offenses and in drafting those portions of the Sarbanes-Oxley Act that called on the United States Sentencing Commission to consider raising the guidelines penalties for obstruction of justice and corporate fraud.

By Executive Order of July 9, 2002, the President established the Corporate Fraud Task Force to oversee and coordinate the enforcement activities of both the Department and a group of other federal law enforcement agencies directed against corporate fraud. The President appointed the Deputy Attorney General to lead the Task Force, amplifying the Deputy Attorney General's existing role of overseeing and coordinating the Department's law enforcement activities subject to the supervision of the Attorney General. The Deputy Attorney General reports regularly on the progress of corporate fraud matters to the Attorney General, and the Attorney General himself has spoken with the Corporate Fraud Task Force to direct them in their mission. Policy and legislative recommendations proposed by the Corporate Fraud Task Force will be subject to the approval of the Attorney General. Members of the Attorney General's staff attend meetings of the Corporate Fraud Task Force as well.

Biden 2. **When announcing the Adelphia indictments on July 24, Deputy Attorney General Thompson stated that the Task Force is, "fulfilling the president's directive to marshal federal law enforcement resources to search out and eradicate corporate fraud." What specific role is the Task Force playing in this investigation? What was done differently because of the existence of the Task Force?**

Answer: The Corporate Fraud Task Force oversees and coordinates federal law enforcement against corporate fraud. On or about July 24, 2002, a criminal complaint was filed in the Southern District of New York against former corporate officers/directors of Adelphia, the sixth largest cable operator in the United States and one of the largest issuers of junk bonds. Defendants recited in the criminal complaint were: John J. Rigas, founder/former chairman of the board of directors; Timothy J. Rigas, former executive vice-president (son) among other corporate titles he held; Michael J. Rigas, former VP of operations (another son) among other corporate titles he held; James R. Brown, former VP of finance; and Michael Mulcahy, former director of internal reporting.

On September 23, 2002, a 24 count indictment concerning the above-referenced individuals was returned which included one count of conspiracy, 16 counts of securities fraud, five counts of wire fraud, and two counts bank fraud. The indictment charges that the Rigas family used billions of dollars in Adelphia's funds and assets for their own benefit, allegedly taking more than $50 million in undisclosed cash advances from Adelphia. The indictment seeks forfeiture of at

least $2.5 billion. If convicted, each of the defendants faces up to 5 years in prison and a $250,000 fine on each of the conspiracy and wire fraud counts. The securities fraud count carries a maximum sentence of 10 years and a $1 million fine. And they face up to 30 years and a $1 million fine on each of the bank fraud counts.

On or about November 14, 2002, James R. Brown pleaded guilty to conspiracy, securities fraud, and bank fraud for his role in the scheme alleged in the indictment. A trial date of January 5, 2004, has been scheduled for the remaining four defendants. A copy of the indictment can be provided upon request.

Biden 3. **An article in the August 5, 2002 edition of *Newsweek* magazine notes that the "Corporate Fraud Task Force had taken an interest in the stage managing of [Adelphia Communications founder John Rigas' arrest]. What they wanted was a perp walk." What role, if any, did the Task Force play in the manner in which John Rigas was arrested in New York City on July 24, 2002?**

Answer: The decision as to the timing and manner of the apprehension of a specific criminal defendant is committed to the discretion of the prosecutors and investigators. In making that decision, they must rely on a range of factors, among which is the risk that the defendant may attempt to flee the jurisdiction or take other steps to obstruct justice.

Biden 6. **The FBI released preliminary 2001 crime statistics last month. They detail a troubling trend. Crime was up 2% in 2001, the first time it has gone up in 10 years. Murder was up 3%, the first increase in 10 years. Robbery was up 3.9%, the first increase in 10 years. Overall property crime was up 2.2%, the first increase in 10 years. Rape and motor vehicle theft posted their second straight increase after eight straight years of decline. Every category tracked by the FBI except one aggravated assaults showed increases.**

I know these numbers are preliminary, but generally the numbers do not shift much when they are finalized in the fall. To what to do you attribute this trend?

Answer: The FBI Uniform Crime Reporting Program collects, compiles, publishes, and archives crime data from participating law enforcement agencies in the U.S. We do not interpret the social or economic causes of crime trends. Therefore, we cannot answer the question "To what do you attribute this trend?" which refers to the rise in crime reflected in our *Preliminary Annual Uniform Crime Report, 2001*.

Biden 8. **There has also been talk at the Department of Defense about moving further away from counter drug matters. One of the things that the Department of Defense does -- and it does very well is training about 100,000 state and local law enforcement officials each year on counter narcotics issues. Right now these schools are run by the National Guard, but there is talk of handing them over to the DEA. While I trust the DEA implicitly to take on this new challenge, I hope that the National Guard would continue this important work. Should the responsibility fall to the DEA, I am worried that they may not get the funding that they need.**

If the DEA has to take on these new responsibilities, what exactly will you do to ensure that they have the funds that they need?

Answer: If the Administration were to consider the transfer of the National Guard Counterdrug Schools to another federal agency, it would require significant analysis to identify accurately all potential obstacles to support the mission transfer, including both transition and sustaining costs. This study would need to identify present operating costs, sources of income (including federal, state and local grants and partnership agreements), as well as any changes in costs or income/grant eligibility and authorization necessitated by the change from the Department of Defense to a federal law enforcement agency. Each course of action must be considered to ensure the present level and quality of training for the state and local law enforcement agencies is maintained.

Biden 11. **The President's proposal to create a Department of Homeland Security envisions shifting the Department's Office of Domestic Preparedness into the new agency. As you know, ODP currently administers equipment and training grants to first responders. I have received nothing but positive feedback about this program, and have been told it is administered by men and women who understand the needs of local law enforcement. In my view, this is due in part to the fact that the program is currently housed in the nation's chief law enforcement agency.**

In his FY03 budget request, the President proposed shifting ODP into FEMA and proposed renaming ODP's program the "First Responders Initiative". I understand you supported this move, despite the fact that FEMA has no experience dealing with the needs of local law enforcement agencies.

Who will administer the First Responders Initiative in the new Department of Homeland Security? If it is not ODP in the new agency, why not? Would

you support efforts in the Senate that would preserve ODP's mission and functions in
the new Department of Homeland Security?

Answer: The Department of Justice supported the President's proposal to establish the Department of Homeland Security. The transfer of ODP to DHS will provide state and local first responders with a single source for the funding available for equipment grants, training programs, and other preparedness efforts.

Senator Grassley

Grassley 2. **With the blessing of Director Mueller, each FBI field office will be given the freedom to tailor its own investigative program within its own district. I note that as recently as 1998, FBI offices in the following districts had drug convictions, as a percentage of the entire workload, as high as: Eastern St. Louis -- 80%, Mobile -- 66%, Eastern Oklahoma -- 56%, Knoxville -- 55%, and Charleston, WV -- 54%. What guidelines are you providing them so as to ensure that proactive, preemptive counterterrorism investigations are the number one priority?**

Also, regarding the prioritization of the FBI's criminal jurisdiction, the Director has said that his approach will be "flexible". The FBI will pull resources from certain investigative areas only when it is satisfied that sufficient and qualified local, state, and other Federal agency resources exist that can "pick up the slack". Are you offering any assistance so that these agencies may be able to do the work at a level consistent with the Bureau's past performance?

Can you assure me that as other agencies begin to expand their roles in the investigative arenas previously dominated by the FBI, that the FBI will share its institutional knowledge and criminal intelligence with them? We cannot afford to waste time and resources having other law enforcement agencies being forced to "reinvent the wheel" or duplicate large, expensive investigative operations that have already been undertaken and documented by the FBI.

Answer: Director Mueller has discussed the shift of resources from criminal investigations to counterterrorism in several meetings attended by all FBI Special Agents in Charge. Additionally, the Director has discussed the importance of preventing terrorist acts in all employee messages and other internal communications, speeches to public groups, and in testimony before Congress

all of which are posted on internal and public FBI web sites. Director Mueller anticipates issuing further statements emphasizing the shift of FBI priorities as part of his on-going re-engineering and refocusing initiative.

State and local governments receive funds through OJP formula grant programs that they may use to help mitigate the impact of the FBI redirections. In addition, OJP provides funding to the Regional Information Sharing System (RISS), which supports state and local law enforcement efforts to combat drug trafficking and organized criminal activity. OJP will continue to support RISS to enhance the ability of state and local agencies to identify, target, and remove criminal conspiracies and activities.

The FBI does not intend to completely withdraw from any area of its criminal law enforcement jurisdiction as a result of the decision to redirect investigators to counterterrorism. Instead, the level of FBI investigative resources involved in some activities may be reduced from levels previously allocated. Therefore, other federal, state, and local agencies will still have access to FBI institutional knowledge and criminal intelligence.

Grassley 3. **I had a meeting with Deputy Attorney General Larry Thompson on March 13, 2002. I told him we needed to roll back the mission creep the Bureau has engaged in regarding its investigative program. I asked Mr. Thompson to look at the entire spectrum of federal law enforcement and to make the necessary recommendations to help focus the Bureau on areas where there is not as much duplication of jurisdiction with other Federal state and local agencies. For instance, I want to see the FBI moving away from drug cases and deeper into anti/counter terrorism investigations. Mr. Thompson was receptive to reviewing all the Memorandums of Understanding (MOUs) the Bureau has with other agencies regarding shared jurisdiction. As Chairman of the DOJ's Strategic Management Council, he said this was an action he could initiate administratively. The bottom line is eliminating the potential for the Bureau to claim arrest and case credit for the work being done (and similarly claimed and reported) by other agencies and ensuring the Bureau is focused n counter terrorism. How is that project going?**

Answer: The Deputy Attorney General, in his capacity as Chairman of the Department of Justice's Strategic Management Council, is in the process of completing a comprehensive review of the FBI that will address, among other issues, the FBI's mission and investigative priorities and the FBI's relationships with other Federal as well as state and local law enforcement authorities.

ATTACHMENT A:

Sen. Leahy Question 27:

The Foreign Terrorist Tracking Task Force has the ability to search on-line [commercial and government databases to look for connections between people]. For example, if US intelligence gets information that two people who met with terrorists abroad may be in the United States, [the Task Force is able to search on-line databases to find where they live, their phone numbers, their bank accounts, their airline ticket purchases, and other details that not only would show their activities, but also would identify people who associated with them. In fact, if the government had conducted such an analysis using information on two of the 9/11 hijackers,] it might have been possible to link those two with all 17 other hijackers [and locate them for investigation] before the attacks. Is that correct?

Answer to Question 27:
The FTTTF has not done an exhaustive retrospective analysis of all "on-line" databases that would have been available "before the attacks" on 9/11. However, even if such positive search results were "possible" and the tens of thousands of persons on various "look-out" lists were analyzed one-by-one, and we have some question whether any government body could have acted in that fashion at that time, a positive answer to the question as posed is not plausible.

In the first place, even today, much public and private commercial electronic data is not available or cannot be realistically searched "on-line" and is only available "off-line." For example, much of what is done by government and private commercial mailing-list firms is only periodically updated, available by paid subscription, searchable only by third party providers, or obtained from non-electronic sources only available as "hard copy." Indeed, even with the new post 9/11 USA Patriot Act statutory authority and advanced copies of cutting edge computer search tools, it is a challenge for any organization, private or public, to organize a comprehensive search of all associated persons identified in searches of all these various kinds of data.

Before the attacks, if the names of two of the 9/11 hijackers were available among the tens of thousands of names on various government "lookout" lists, absent some special reason or behavior which focused on those two names, it is pure speculation now whether something would have caused the FTTTF to treat them differently from the rest of the list. Although this universe of tens of thousands of names is stored electronically, even under today's technology

they would not likely be checked utilizing "on-line" technology.

Again, even given the assumption that the names had been so checked and street addresses were found, it is speculation: (1) whether that street address was valid and current; or (2) whether there would have been some indication of further illegal activity under consideration by those two persons such as to make them warrant further follow-up computer effort, when compared with all the other names among the tens of thousands on the lookout list for whom some kind of dated "hit" might have been received from comparisons with other available public or commercial data bases.

Consequently, the further assumption has to be made that every possible link, including special off-line information about these persons was requested and that all the current and still developing kinds of computer analyses available would have been available and used, in order to reach the result posited. Not only was this data scenario probably not available before 9/11, but the question focuses on the answer, without taking into account all the other competing computer queries and positive responses that would have had to be dealt with and resolved in some fashion, before such a result could be accomplished.

To use an analogy, we know it is possible for powerful high-speed computers to "find needles in haystacks," for example, by making the correct series of moves and winning sophisticated games of chess. Thereafter, evaluating all of the computer's sequential moves in a particular game, from the vantage point of hindsight, may seem a useful exercise. In fact, standing alone it does not tell a meaningful story about the computer's abilities to win other games because the computer's moves were selected from among hundreds of thousands, or possibly even millions, of unseen but "possible" combinations. Similarly here, the possibility of "on-line" public data hits before 9/11 -- of one kind or another, unconfirmed as to correctness or currency and facially matching names on government "look-out lists" is not a useful indicator to retrospectively predict what subset of all of those names gamering some kind of "hit" would have been sufficient to indicate further inquiries.

Sen. Leahy Question 41:
What is the Justice Department's new Foreign Terrorist Tracking Task Force doing now that was not done before 9/11 and how would the Task Force help disrupt a similar plot today?

Answer to Question 41:

Prior to 9/11 and the provisions of the USA Patriot Act that resulted, there was no single organization that was available to coordinate a consolidated terrorist list from among the various federal government multi-agency terrorism and counter-intelligence data banks, and then provide a response utilizing sophisticated risk analysis techniques to official data inquiries about persons of interest in a swift and comprehensive manner.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 3, 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the Department's third and final submission responding to written questions posed to the Attorney General at the hearing before the Committee on the Judiciary entitled "Oversight Hearing of the Department of Justice" on July 25, 2002.

This submission contains the Department's responses to the remaining 17 outstanding responses, and supplements our responses dated December 23, 2002, and July 17, 2003, in which we responded to 74 questions. In addition, in response to Senator Leahy's questions number 44 through 93, the Department forwarded to the Committee our responses to House Judiciary Committee questions on USA PATRIOT Act implementation in two letters, dated July 29, 2002, and August 26, 2002. Please note that Attachment D has been labeled "Law Enforcement Sensitive."

Thank you for the additional time afforded to the Department to respond to your questions. If we can be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Questions for Attorney General Ashcroft
July 25, 2002 Senate Judiciary Committee Hearing
(3rd Submission)

Leahy 10. **Chairman Leahy has 23 outstanding requests to various Department components, dating back to July, 2001, to which the Department has not yet responded. Please advise the Committee when responses to the following requests will be forthcoming or, better yet, provide a response.**

Answer: The Department's Office of Legislative Affairs has been in contact with your staff regarding the status of the requests you have submitted to the Department, and we are working to resolve expeditiously all those outstanding inquiries.

Leahy 13. **The Attorney General's new FBI guidelines authorize the FBI to attend public meetings and monitor Internet chat rooms without any indication or suspicion of possible criminal or terrorist activity. In other words, the FBI may send out agents to look for criminal activity anywhere, at any open meeting or any Internet site, with no standards to decide where to go or where to log on, and without Attorney General guidance on how to prioritize and make effective use of their resources.**

(A) Does the Attorney General expect that specific guidance on priorities and uses of FBI resources to come from Director Mueller in field guidance that he issues?

Answer: The FBI has advised its field offices and headquarters divisions of the requirements imposed by the Attorney General Guidelines concerning Visiting Public Places and Events (Part VI Section A.2.) and Use of Online Resources Generally (Part VI, Section B.2) and has cautioned that these authorities are limited in a number of ways. For example, FBI employees have been advised that visits to public places or events must be for the purpose of detecting or preventing terrorist activities. In addition, FBI guidance provides that agents may only visit public places and events pursuant to Part VI. Section A.2. authority "on the same terms and conditions as members of the public generally," so that, even though the terms and conditions of such visits may vary depending on the public place or event, it is clear that they do not include gaining access to a place or event through pretext. Third, employees are reminded that they may not retain information obtained from such visits unless it relates to potential criminal or terrorist activity, which is consistent with FBI prohibitions against the maintenance of files on individuals solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of the United States. Finally, agents should seek supervisory approval of such visits when time permits to help

ensure that the attendance is for an authorized law enforcement purpose and reflects the appropriate balance between law enforcement and First Amendment concerns.

(B) What safeguards will the FBI put in place to prevent agents from using the information they get to open files on people's criticism of the government, or on other political or religious beliefs?

Answer: The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations explicitly prohibit the misuse of the information gathering authorizations, set out in Part VI of the Guidelines, as described in your question. Visiting places and attending events that are open to the public pursuant to Part VI.A(2) is only authorized "[f]or the purpose of detecting or preventing terrorist activities." Part VI.A(2) further provides that "[n]o information obtained from such visits shall be retained unless it relates to potential criminal or terrorist activity." The authority under Part VI.B(2) to "conduct online search activity and to access online sites and forums on the same terms and conditions as members of the public generally" can only be exercised "[f]or the purpose of detecting or preventing terrorism or other criminal activities."

All of the information gathering activities under Part VI - including attendance at public events and accessing public Internet sites and forums - are subject to an express prohibition against misuse to monitor activities protected by the First Amendment. Part VI.C(1) provides: "The law enforcement activities authorized by this Part do not include maintaining files on individuals solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of the United States. Rather, all such law enforcement activities must have a valid law enforcement purpose as described in this Part, and must be carried out in conformity with all applicable statutes, Department regulations and policies, and Attorney General Guidelines."

(C) Director Mueller has been asked to consult with this Committee on the instructions he issues for implementing the new guidelines as his predecessor did so this oversight Committee is able to understand how the new guidelines will work in practice. Does the Attorney General have any problem with that consultation?

Answer: The Attorney General has no objections to Director Mueller consulting with the Committee on instructions prepared for implementing the May 2002 guidelines.

Leahy 16. Director Mueller has identified a serious need to enhance the FBI's analytical capabilities and, to do so, has arranged for 25 CIA analysts to be detailed to the FBI. At the same time, Governor Ridge suggested in his testimony that some analytical functions in the new Department of Homeland Security will

be staffed by moving FBI's new analysts to the Homeland Security Department, either by detailing them over or transferring the FBI's new office. What does the Attorney General think of any proposals to move FBI analysts to the new Department of Homeland Security?

Answer: While some FBI analyst positions and personnel were transferred to the Department of Homeland Security (DHS) through the March 2003 transfer of the Analysis and Warning Section of the National Infrastructure Protection Center, the FBI's primary means of enhancing the intelligence analysis available to DHS is through the FBI's participation in the Terrorist Threat Integration Center (TTIC), which is a partnership between the FBI, CIA, DHS, Department of Defense, and other participating agencies. The FBI's experience in conducting complex criminal and terrorism investigations has shown that analysts are most effective when they are in constant and close communication with investigators. For this reason, the FBI welcomes the co-location of analytical elements of the FBI's Counterterrorism Division (CTD), the CIA's Counterterrorism Center (CTC), DHS, and other U.S. agencies participating in the TTIC. Although these elements will retain their distinctive operational responsibilities and authorities through their respective chains of command, this co-location will enhance the interaction, information sharing, and synergy among U.S. officials involved in the war against terrorism. This will allow FBI analysts to continue to support FBI investigations and operations, while contributing the skills developed and improved through participation in the FBI's recently established College of Analytical Studies to both the FBI and the greater Intelligence Community.

Leahy 22. **In the July 3 letter to Senator Levin, the Department stated that 611 people had been subject to closed immigration hearings. How many of those people were represented by counsel?**

Answer: All respondents in Immigration Courts are entitled to be represented by counsel at no expense to the government, and all are given a list of pro bono attorneys who may be willing to represent them at little or no cost. The respondents are also free to represent themselves.

Detention of Citizens

Leahy 25. **What is the Justice Department's legal justification for the military detention of American citizens, particularly a citizen arrested in this country, when Congress has enacted a law (18 U.S.C. § 4001) that forbids the imprisonment or detention of an American citizen without statutory authorization?**

Answer: As a unanimous panel of the Fourth Circuit has recently explained, the President's war powers under the Commander-in-Chief Clause "include the authority to detain those captured in armed struggle." *Hamdi v. Rumsfeld*, 316 F.3d 450, 463

(4th Cir. 2003) ("*Hamdi III*"). *See also Hamdi v. Rumsfeld*, 296 F.3d 278, 281 (4th Cir. 2002) ("The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2.") ("*Hamdi II*"). Indeed, it has long been settled that the President has authority under the Commander-in-Chief Clause to direct the military to detain enemy combatants engaged in an armed conflict with the United States. As the Supreme Court explained in *Ex parte Quirin*, 317 U.S. 1, 31 (1942), "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces," and "[u]nlawful combatants are likewise subject to capture and detention." In addition, "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." *Id.* at 38. *Accord In re Territo*, 156 F.2d 142 (9th Cir. 1946); *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). It is under that constitutionally assigned presidential authority that Jose Padilla and Yaser Esam Hamdi are being held as enemy combatants.

Congress did not interfere with that constitutional authority when it enacted 18 U.S.C. § 4001. Certainly, nothing in the text of the section indicates that it was meant to address detention of enemy combatants. As the Fourth Circuit has also explained, "it has been clear since at least 1942 that citizenship in the United States of an enemy belligerent does not relieve him from the consequences of his belligerency. If Congress had intended to override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit." *Hamdi III*, 316 F.3d at 468 (alterations and citations omitted). Thus, the Court concluded that "[t]here is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is." *Id.*

The Fourth Circuit also explained that, "[e]ven if . . . § 4001(a) requires Congressional authorization" for detention of citizens as enemy combatants, "Congress has, in the wake of the September 11 terrorist attacks, authorized the President to 'use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks' or 'harbored such organizations or persons.' . . . [C]apturing and detaining enemy combatants is an inherent part of warfare; the 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops." *Id.* at 467 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (emphasis added by the Court)). The Fourth Circuit also pointed out that "Congress has specifically authorized the expenditure of funds for 'the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined ... to be similar to prisoners of war.'" *Id.* (quoting 10 U.S.C. § 956(5) (2002)). Based on these

congressional enactments, the Fourth Circuit properly concluded that detention of combatants such as Hamdi has been authorized by an act of Congress for purposes of section 4001. *See also Padilla v. Bush*, 233 F. Supp. 2d 564, 597-99 (S.D.N.Y. 2002) (similarly concluding that the Authorization for Use of Military Force of September 18, 2001 renders the detention of Padilla "pursuant to an Act of Congress" within the terms of section 4001).

(A) That statute was passed by Congress in 1971 to prevent detentions like those suffered by Japanese-Americans in World War Two. Does the Justice Department believe the law is unconstitutional?

Answer: As explained above, 18 U.S.C. § 4001 was not intended to restrict the President's constitutional authority as Commander in Chief to detain enemy combatants in a time of armed conflict. The Justice Department's conclusion that both Hamdi and Padilla can be detained consistent with section 4001 thus does not depend on a belief that the law is unconstitutional. Indeed, the fact that the law was intended to prevent detentions like those suffered by Japanese-Americans during World War II only confirms that the statute was not intended to interfere with the President's constitutional authority to detain enemy combatants. Japanese-Americans were *not* held as enemy combatants (or POWs) during World War II. To the contrary, they were subjected to civil detention based upon a suspicion of disloyalty. A law intended to prevent reassertion of that sort of detention authority has no effect on the distinct power to detain enemy combatants. It is the Department's view that *if* the statute were construed to interfere with the President's authority to detain enemy combatants it would, at a minimum, raise grave constitutional concerns. Thus, the canon of constitutional avoidance – under which a statute should be construed to avoid serious questions as to its constitutionality -- bolsters the reading of the statute outlined above.

In its recent ruling in *Hamdi*, the Fourth Circuit took a similar approach to section 4001 and concluded that the section was not meant to restrict in any way the President's power with respect to enemy combatants. The Court explained that proponents of 18 U.S.C. § 4001(a) were concerned about the internment of citizens based on mere suspicion of disloyalty and not about the distinct issue of detaining enemy combatants. As the Court explained:

> It is . . . significant that § 4001(a) functioned principally to repeal the Emergency Detention Act. . . . Proponents of the repeal were concerned that the Emergency Detention Act might, inter alia,

> 'permit[ ] a recurrence of the round ups which resulted in the detention of Americans of Japanese ancestry in 1941 and subsequently during World War II.' There is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is.

Hamdi III, 316 F.3d at 468 (citations omitted; alterations in original). The Court thus held that § 4001(a) does not address the authority of the President to detain enemy combatants.

Leahy 26. **Shortly after the Attorney General announced Mr. Jose Padilla's transfer to military authorities, the Department of Justice briefed the Judiciary Committee regarding the asserted legal and policy bases for such detention of American citizens. In that briefing, Department officials stated that those detained like Mr. Padilla would have some avenue of judicial review open to them and would have access to counsel during that process. However, in a legal pleading in the Hamdi case, the Department stated that the right to counsel did not apply to enemy combatants who are captured and detained on the battlefield in a foreign land; enemy combatants who are captured overseas and brought to the United States for detention . . . *and enemy combatants who are captured and detained in this country."*(emphasis added). This view is seemingly at odds with the information conveyed previously by Department officials - namely, that Mr. Padilla would have a lawyer and judicial review of his detention. What is the Department's position?**

Answer: A United States citizen detained as an enemy combatant can challenge his detention solely by seeking a writ of habeas corpus in the appropriate Federal district court. A petition for habeas corpus has, in fact, been filed on Jose Padilla's behalf by an attorney acting as a next friend.

As the Department explained last fall in answers to questions from Senator Feingold, persons held as enemy combatants have no right of access to counsel to challenge their detention either under the Constitution or under the laws of war. The rights the Constitution affords persons in the criminal justice system simply do not apply in the context of detention of enemy combatants. The Sixth Amendment does not provide a right to counsel to enemy combatants because it applies only after the formal initiation of criminal charges. *See, e.g., Texas v. Cobb*, 532 U.S. 162, 167–68 (2001) (the Sixth Amendment right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of

adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information or arraignment") (internal quotation marks omitted); *cf. Ex parte Toscano*, 208 F. 938, 940 (S.D. Cal. 1913) (Sixth Amendment has no application to internment of belligerent forces because such detention "in no way relates to a criminal prosecution"). Similarly, the Fifth Amendment's Self-Incrimination Clause provides a trial right to criminal defendants and the right to counsel that the Supreme Court has inferred under that Clause is designed to protect a criminal defendant's rights at trial. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (violation of Self Incrimination Clause "occurs only at trial"). There is also no Due Process Clause right for enemy combatants to have access to counsel. Indeed, the United States military has captured and detained enemy combatants during the course of virtually every major conflict in the Nation's history and, as far as we are aware, it has never even been suggested that such prisoners have a right to access to counsel to challenge their detention. Counsel has been provided when those combatants have been prosecuted for war crimes or violating other military regulations.

An enemy combatant does not have a general right of access to counsel under the laws of war either. As you know, the President has determined that members of the Taliban and the al Qaeda terrorist network do not qualify for status as prisoners of war entitled to the rights and privileges of the GPW. *See United States v. Lindh*, 212 F. Supp.2d 541, 557-558 (E.D. Va. 2002) ("On February 7, 2002, the White House announced the President's decision, as Commander in Chief, that the Taliban militia were unlawful combatants pursuant to GPW and general principles of international law, and, therefore, they were not entitled to POW status under the Geneva Conventions."); White House Fact Sheet, Status of Detainees at Guantanamo, Feb. 7, 200 (www.whitehouse.gov/news/releases/2002 /02/20020207-13). Even if the protections of GPW did apply, the Geneva Convention clearly permits the detention of members of enemy forces *without* access to counsel. The Convention requires the detaining power to provide counsel only when a prisoner is *charged* with a war crime or violation of disciplinary regulations during his period of confinement. *See* GPW art. 105. It does not require a detaining power to provide access to counsel for every prisoner of war who is detained.

The Department's position on the right to counsel was recently articulated to the Fourth Circuit in the brief filed in the *Hamdi* case (which I attach). There, the Department explained that, unlike a criminal defendant, an enemy combatant has no right to counsel under either the Constitution or under the laws of war. And as the Fourth Circuit itself explained, "[a]s an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, *if* he had been charged with a

crime. But . . . Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to the well-established laws and customs of war." 316 F.3d at 475 (emphasis added).

(A) What is the legal authority for the military detention of American citizens (a) Jose Padilla, (b) John Walker Lindh, and (c) Yaser Hamdi?

Answer: John Walker Lindh is not being held in military detention. He is imprisoned and serving a sentence pursuant to a valid criminal conviction entered upon his guilty plea. Jose Padilla and Yaser Hamdi are being held as enemy combatants.

(B) Please provide a copy of the order transferring Padilla from civilian to military custody and the order transferring Lindh from military to civilian custody and any legal justification for those orders.

Answer: Please find attached [1]a redacted copy of the President's order of June 9, 2002 directing that Padilla be placed under the control of the military and detained as an enemy combatant. This is the same redacted version that was provided to the court hearing the habeas petition challenging Padilla's detention. As the Department explained in response to a similar request from Senator Feingold last fall, we are happy to provide an unredacted copy of that order for your inspection upon request.

As for your request concerning John Walker Lindh, any order directing military personnel to surrender control of him to civilian authorities would be in the possession of the Department of Defense.

(C) If there is no statutory basis for such detention, why is 18 U.S.C. § 4001, which makes it a federal crime to order the detention of American citizens without statutory authorization, inapplicable?

Answer: As was explained more fully above in the answer to question 25, Congress did not interfere with the President's constitutional authority as Commander in Chief to detain enemy combatants when it enacted 18 U.S.C. § 4001. The Fourth Circuit has recently agreed with this analysis and has concluded that section 4001 does not address the President's exercise of his authority as Commander in Chief to detain enemy combatants. *See Hamdi III*, 316 F.3d at 467-68. In addition, even if section 4001 did apply in this context, Congress has authorized the detention of enemy combatants through the Authorization for Use of

[1]Attachment A

Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). *See Hamdi III*, 316 F.3d at 467; *Padilla*, 233 F. Supp. 2d at 598-99. Finally, we should note that, while 18 U.S.C. § 4001 states a prohibition limiting the detention of U.S. citizens, it does not establish any federal crime.

(D) What is the position of the Department of Justice as to the substantive standard that must be met in order to detain a U.S. citizen as an enemy combatant? What is the burden or level of proof required in order to meet that standard?

Answer: As the Department explained last fall in answers to questions from Senator Feingold, the Supreme Court has given guidance on the legal standards governing the circumstances under which a United States citizen seized in the United States may be held as an enemy combatant. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court made clear that, at a minimum, "citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of . . . the law of war," *id.* at 37-38, and thus may be detained. *See also id.* at 45 (noting that those who are "a part of or associated with the armed forces of the enemy" may be held). The Court also explained that a person may be seized and held as an enemy combatant even if he has "not actually committed or attempted to commit any act of depredation or entered the theater or zone of active military operations." *Id.* at 38. The important factor is that the person has become a member of or associated himself with hostile enemy forces, thereby attaining the status of a belligerent.

The decision in *Quirin* clarified and limited the scope of the Civil War era decision in *Ex parte Milligan*, 71 U.S. 2 (1866), in which the Court had held that a United States citizen who never had been in enemy territory and who was a civilian and "in nowise connected with the military service" or with the forces of the enemy, *id.* at 122, could not be subjected to the laws of war. *Quirin* made clear that the Court's decision in *Milligan* must be understood "as having particular reference to the facts before it." *Quirin*, 317 U.S. at 45. A person like Milligan, "not being a part of or associated with the armed forces of the enemy," could not be held by the military because he did not have the status of a belligerent. *Id.*

As for the level of proof the government must meet in court to justify a detention, the Department has thoroughly explained its view in briefs submitted to the Fourth Circuit in the *Hamdi* case. On page 28 of the

United States' brief in that case[2], the Department explained that, at most, the government is required to show "some evidence" in support of its determination. The Fourth Circuit declined to rule generally on the use of that standard, *see Hamdi III*, 316 F.3d at 474, and instead ruled that, in the circumstances of the *Hamdi* case, once the government had made "factual averments" that, "if accurate, are sufficient to confirm that [a detainee's] detention conforms with a legitimate exercise of the war powers given the executive by Article II, Section 2 of the Constitution and, as discussed elsewhere, that is consistent with the Constitution and the laws of Congress," *id.* at 473, the detention would be justified.

(E) What types of acts by American citizens could subject them to detention as enemy combatants? Could any of the following acts, in the Department's view, subject an American citizen to detention as an unlawful combatant as a matter of law: (i) an act of violence, whether planned or actual; (ii) harboring an alleged combatant; (iii) providing material support to an enemy combatant; and (iv) money laundering to aid terrorism-related activities?

Answer: As we explained more fully in answering question 26(D), acts making an individual a part of or associated with hostile enemy forces render the individual an enemy belligerent subject to detention. Whether an individual has associated himself with enemy forces is a highly fact-specific question. Depending on the circumstances, many of the acts to which you refer could be deemed evidence of association with the enemy force that would be relevant in determining combatant status.

(F) Regarding potential judicial review of the detention of American citizens:

i. What judicial review, if any, does the Department believe is available to an American citizen detained as an enemy combatant?

Answer: A United States citizen detained as an enemy combatant can challenge his detention solely by seeking a writ of habeas corpus in the appropriate Federal district court.

ii. What issues would a court have authority to review in such a matter?

Answer: As the Department recently explained in its brief before the Fourth Circuit in the *Hamdi* case, the role of the courts in adjudicating a habeas petition filed on behalf of citizen held as an enemy combatant is extremely limited. The Executive's determination that an individual is an enemy combatant is

[2]Attachment B

a quintessentially military judgment that is constitutionally assigned to the Executive under the Commander-in-Chief Clause. The courts must treat such determinations with great deference. Upon habeas review, a court may determine as a matter of law whether, on the facts alleged by the government (assuming those facts to be true), the person may properly be detained under an exercise of the war power. *See, e.g.*, *Hamdi III*, 316 F.3d at 473 (concluding that "[t]he factual averments in the affidavit, if accurate, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by Article II, section 2 of the Constitution"); *see also id.* at 472 (noting that the court may determine "whether the factual assertions set forth by the government would, if accurate, provide a legally valid basis for Hamdi's detention under [the war] power"); *Ex parte Milligan*, 71 U.S. 2, 121-22 (1866) (concluding that, based on stipulated facts presented, the individual in question could not be subjected to the laws of war). Any review of factual determinations underpinning a decision to detain an individual as an enemy combatant must, if permitted at all, be extremely limited. As the Department of Justice has explained in the *Padilla* and *Hamdi* cases, under any constitutionally appropriate standard of review, the most that the court should do is confirm that there is "some evidence" justifying the conclusion that the individual is an enemy combatant. The Southern District of New York recently agreed that the "some evidence" standard was the appropriate standard of review in the *Padilla* case. *See Padilla* 233 F. Supp. 2d at 608.

iii. What would the burden of proof be in such a proceeding?

Answer: Please see my answer to question 26(F)(ii), above.

iv. What would be the nature and extent of the detainee's right to counsel in such a proceeding?

Answer: As explained above in the answer to question 26, a person held as an enemy combatant has no right to counsel in such a proceeding.

v. What would be the method of proof and the evidentiary rules of such a proceeding?

Answer: The same rules concerning admissibility of evidence would apply in a habeas case challenging a military detention as in other habeas corpus actions.

(G) Who makes the final decision as to whether American citizens will be

detained as enemy combatants or under the civilian justice system? Is the Department of Justice consulted on all such decisions? What other agencies participate in the decision?

Answer: As the Department of Justice explained in answer to questions from Senator Feingold last fall, the Department of Defense is responsible in the first instance for determining whether a particular individual is an enemy combatant over whom the armed forces should take control. Of course, any such determination is subject to the President's ultimate decision as Commander in Chief of the armed forces, but there is no requirement imposed by the Constitution or laws of the United States that the President personally make a determination each time a United States citizen is taken into the control of the military as an enemy combatant. In addition, the Attorney General may provide legal advice in these matters, as in other matters, to the President and to members of the cabinet concerning the legality of proposed government action.

(H) What factors are considered in determining whether an American citizen will be detained as a hostile combatant or arrested and/or charged under our normal civilian justice system? Specifically, is the insufficiency of admissible evidence to prove that a citizen committed a crime one of the factors considered in deciding to allow the military to detain him as an enemy combatant?

Answer: As described more fully in my answer to question 26(D), an American citizen can be detained as an enemy combatant if evidence indicates that he has become a member of or associated himself with hostile enemy forces, thereby attaining the status of an enemy belligerent.

In cases involving terrorism, as in all cases, the decision whether to bring criminal charges against an individual is influenced by a host of factors, including the strength of the evidence that the individual has committed a federal crime; the potential that publicly disclosing evidence necessary to obtain a conviction might compromise national security by exposing sensitive intelligence sources and methods; and the likelihood of ultimately obtaining a conviction. Where an individual satisfies the standards both for designation as an enemy combatant and for the filing of criminal charges, the decision as to which path to pursue takes into account multiple considerations including (as in all cases) the likelihood of obtaining a conviction, the public interest, and national security.

(I) Please explain why the detention of John Walker Lindh was treated in the exact opposite manner as Mr. Padilla's, in that Mr. Lindh as he was initially

detained by the military and then, presumably in part because of his American citizenship, transferred for a trial in the United States court system, while Mr. Padilla was arrested as a material witness under our normal system, held for a month, and then transferred to the custody of the military?

Answer: John Walker Lindh came under the control of the military in a battle zone in Afghanistan and was held as an enemy combatant. It was later determined that the evidence concerning Mr. Lindh supported criminal charges against him and, taking into account a range of factors, it was decided that criminal prosecution was the best course to pursue. He was therefore transferred to the custody of civilian authorities for purposes of prosecution. As you know, it is the Department's policy not to discuss internal deliberations leading to charging decisions.

Jose Padilla was arrested and detained as a material witness pursuant to 18 U.S.C. § 3144 because it was believed that his testimony would be material to an ongoing criminal proceeding. He was transferred to military control after it was determined that he satisfied the substantive standard for designation as an enemy combatant and that, again based upon a range of factors, that would be the best course to pursue with him.

(J) Please explain why Zacharias Mousaoui and Richard Reed, who are alleged terrorists and not American citizens, are being prosecuted in our civil courts while Jose Padilla is being held as a military detainee.

Answer: Jose Padilla is being held as a military detainee because it has been determined that he satisfies the substantive standard for designation as an enemy combatant, as set forth in the answer to question 26(D).

Zacharias Moussaoui and Richard Reed are being prosecuted on criminal charges because it has been determined that the evidence warrants the filing of criminal charges, in accordance with the criteria set forth in question 26(H).

(K) If an American citizen is detained inside the United States as an enemy combatant, what rights, if any, does he have to counsel during interrogation? Are there any legal restrictions, whether based on Constitutional or international law, upon the interrogation of such a person?

Answer: As explained above in the answer to question 26, enemy combatants do not have a general right to counsel and do not have a right to counsel during interrogation. Under the Constitution and international law,

unlawful enemy combatants may be interrogated.

(L) How long may an enemy combatant who is a United States citizen be held? Who makes that decision and is it subjected to review?

Answer: Detention of enemy combatants is designed to prevent a combatant from rejoining enemy forces and from engaging in further hostile acts against the United States. Thus, as courts have explained, "[t]he object of capture is to prevent the captured individual from serving the enemy." *In re Territo*, 156 F.2d 142,145 (9th Cir. 1946); *cf. Ex parte Toscano*, 208 F. 938, 941 (S.D. Cal. 1913) (detention of belligerents by neutral power "is not punishment for crime"). Accordingly, under the laws and customs of war, enemy combatants may be detained at least until the end of hostilities. *See, e.g.*, *Territo*, 156 F.2d at 148 (noting that detention as prisoner of war continued to be lawful when "no treaty of peace has been negotiated with Italy"). *See also Case of Jefferson Davis*, 11 U.S. Op. Att'y Gen. 411, 411 (1866) (stating that Jefferson Davis and others "have been heretofore and are yet held as prisoners of war. Though active hostilities have ceased, a state of war still exists over the territory in rebellion. Until peace shall come in fact and in law, they can rightfully be held as prisoners of war.").

The determination of when an armed conflict has ended is a matter for the political branches, not the courts. As the Fourth Circuit has noted, "[t]he executive branch is . . . in the best position to appraise the status of a conflict," including "the cessation of hostilities." *Hamdi III*, 316 F.3d at 476. In particular, presidential proclamations concerning the start and end of hostilities are deemed conclusive. *See, e.g.*, *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948) (holding that whether a state of "war" exists is a "matte[r] of political judgment for which judges have neither technical competence nor official responsibility," and holding that the President's proclamation that a state of war with Germany continued in 1948 was dispositive, despite "the unconditional surrender of Germany and the disintegration of the Nazi Reich" three years earlier); *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1871) (treating Executive proclamation as dispositive concerning starting and ending dates of the Civil War).

(M) As a legal matter, if an alleged terrorist, whether or not a U.S. citizen, is acquitted of charges, does the Department of Justice believe that the United States still has the power to transfer the individual to military authorities and detain the individual as an enemy combatant?

Answer: The President possesses two distinct sources of authority that will likely apply to many persons who may properly be deemed enemy combatants in

the conflict with al Qaeda. Acting through the Justice Department, the President may prosecute such a person for violations of the criminal laws of the United States. Alternatively, as Commander in Chief of the Armed Forces, the President may order the detention of such a person as an enemy combatant. As the John Walker Lindh case demonstrated, the exercise of one authority at one point in time does not preclude the later exercise of the other authority. In particular, the fact that a person may be found "not guilty" of a particular criminal offense in no way affects the President's legal authority to detain him as an enemy combatant if that person's actions properly give him the status of such a combatant.

(N) Has any person been threatened with designation as an enemy combatant if they did not do or refrain from doing any act, including but not limited to cooperating in any investigation or entering any plea agreement with the United States? Has any internal investigation, whether by the Office of the Inspector General or any Office or Professional Responsibility, been conducted addressing any such allegation?

Answer: To the best of our knowledge, no person has been threatened that he would be designated an enemy combatant if did not do or refrain from doing any act. We also have no knowledge of any internal investigations being conducted regarding such allegations.

Leahy 29. Please explain how the data-mining activities of the Justice Department comport with the Privacy Act, including in particular:

(A) The Computer Matching and Privacy Protection Act states, in section 9, that "[n]othing in the amendments made by this Act shall be construed to authorize ... the computer matching of records not otherwise authorized by law." Are the data-mining and matching activities contemplated in the Attorney General guidelines "otherwise authorized by law"?

Answer: The terms "data-mining" and "matching" do not appear in the Attorney General guidelines. The Department would require further information on the "data-mining and matching activities contemplated in the Attorney General guidelines" in order to respond to your question.

(B) The Privacy Act, 5 U.S.C. ' 552a(c), requires every agency that discloses a record to another agency or person to keep an accounting of those disclosures. How is the Department complying with this requirement?

Answer: The Department's methods for complying with 5 U.S.C. § 552a(c) varies by Component. For example, consistent with the Privacy Act, the FBI's Manual of

Investigative Operations and Guidelines (MIOG), part I, section 190-3.3 requires that each time a record pertaining to an individual is disseminated to a person or other Federal, state, local or foreign agency, whether orally or by other means of communications, an accounting must be kept. The accounting must include the date, nature, and purpose of each disclosure, as well as the name and address of the person or agency to whom to the disclosure is made. The MIOG requires that the accounting be kept for six years or the life of the record, whichever is longer, following the disclosure.

While FBI policy requires an accounting of each dissemination, and mandates certain information be maintained as part of that accounting, the form of the accounting is not dictated and may be accomplished through the generation of a document reflecting the accounting, a notation on the document disclosed, completion of an FD-159, or other appropriate means. In addition, electronic access systems typically create an audit trail, which may also satisfy the accounting requirement.

Leahy 30. **The Attorney General's new Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations make clear that the FBI is authorized to operate, participate in and use available information systems, including "general topical research", "online resources generally", and "reports and assessments." To be effective, the information maintained on these commercial and government systems must be accurate and timely, yet the Guidelines are silent on how FBI investigators will assess the data quality on the information systems they access.**

Answer: **Answer**: Part VI of the Attorney General Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (the Guidelines) entitled COUNTERTERRORISM ACTIVITIES AND OTHER AUTHORIZATIONS, identifies a number of authorized activities which can be carried out even in the absence of checking of leads. This part identifies authorized activities specifically focused on terrorism and activities useful in both terrorism and non-terrorism contexts. Specifically in response to this question, the Guidelines authorize the following:

a) Part VI, Section A.1. Information Systems - The FBI is authorized to operate and participate in identification, tracking, and information systems for the purpose of identifying and locating terrorists, excluding and removing from the United States alien terrorists and alien supporters of terrorist activity as authorized by law, assessing and responding to terrorist risk and threats, or otherwise detecting, prosecuting, or preventing terrorist activities. The FBI may draw and retain pertinent information from any source permitted by law, including information from past and ongoing investigations; information collected or provided by other government entities; publicly available information, whether obtained directly or

through services and resources that compile and analyze such information; and information voluntarily provided by private entities.

b) Part VI, Section B.1. General Topical Research - The FBI is authorized to conduct general topical research by accessing, among other sources, online sites and forums on the "same terms and conditions as members of the public generally." The Guidelines define "General Topical Research" as research concerning subject areas that are relevant for the "purpose of facilitating or supporting the discharge of investigative responsibilities." It does not include online searches for information on individuals except where such searches are incidental to the research, i.e., searching for writings under the author's name.

c) Part VI, Section B.2. Use of Online Resources Generally - The FBI is authorized to conduct online search activity and to access online sites and forums on the same terms and conditions as members of the public generally for the purpose of detecting or preventing terrorism or other criminal activities.

d) Part VI, Section B.3. Reports and Assessments - For the purpose of strategic planning or in support of investigative activities, the FBI is authorized to prepare general reports and assessments concerning terrorism and other criminal activities.

(A) Does the Justice Department plan to (i) create guidelines on how these "other resources" will be selected and used? (ii) share these guidelines with the Senate Judiciary Committee? (iii) create a public notice period for such guidelines? (iv) hold a public comment period on these guidelines?

Answer: The Guidelines themselves govern the use of these authorities.

(B) What is the selection criteria for choosing which databases for research and online resources an agent may regularly use?

Answer: The Guidelines specify that the FBI may use online sites and forums on the same terms and conditions as members of the public generally. The choice of sites and forums would be dependent on the research topic (conducting topical research) or the investigative needs necessitating a particular search.

(C) What type of controls will be maintained on searching criteria by agents?

Answer: The Guidelines provide guidance and controls on the searching criteria to be used. For example, the FBI is authorized to carry out general topical research by researching subject areas relevant for the purpose of facilitating or supporting investigative responsibilities. While conducting such research, the FBI may not search for information on individuals' names or other individual identifiers, except if incidental to the research.

For the purpose of detecting or preventing terrorism or other criminal activities, the FBI may conduct online search activity on the same terms and conditions as members of the public generally. Given that this authority would involve investigative steps necessary to detect and prevent terrorism and other criminal activities, the scope/criteria of a search would depend on the particular circumstances of the investigation being conducted. Obviously, agents may not conduct any investigative activity that would violate the rights of individuals secured by the constitution or laws of the United States, including the Privacy Act.

(D) When searches of information systems that include information on innocent Americans are involved, what procedures will be put in place to limit the disclosure and use of personal information in the search?

Answer: This disclosure and use of personal information will be governed by the Privacy Act.

(E) What type of records resulting from on the searches conducted by agents will be maintained?

Answer: Any records pertaining to the particular authorized activity may be maintained.

(F) How long will search results be maintained?

Answer: Search results will be maintained in accordance with the Federal Records Act and applicable records disposition schedules.

(G) If the results of searches will be electronically maintained on a database, with the resulting database or databases be maintained at the FBI as "systems of records" under the Privacy Act?

Answer: Yes. To the extent that search results are Privacy Act records they will be maintained as part of an FBI system of records. One way the FBI ensures compliance with the Privacy Act is the FBI Privacy Impact Assessment

(PIA) process. The PIA process provides a means to assure compliance with applicable laws, regulations, and policies governing individual privacy and provides FBI officials with a systemic assessment of a new system's impact on privacy prior to implementation of the system. The process includes a review of new or modified systems by FBI legal staff and the FBI Senior Privacy official. If warranted, proposals are submitted to the FBI Privacy Council for review and comment. Through this process, both Privacy Act compliance and privacy policy issues are addressed.

Local Police Enforcement of Immigration Laws

Leahy 42. **The Attorney General has said that that the Department of Justice is entering information about the so-called "absconders" into the NCIC, apparently beginning with those from Arab or Muslim countries. What guidance has the Attorney General issued to the over 650,000 police officers who have access to the NCIC on what they should do if they come into contact with an individual identified as an absconder in the NCIC? Since the NCIC is for the use of state and local police, how does this action conform to only using state and local police to enforce immigration laws in a "narrow anti-terrorism mission" the language used by the Department last week?**

Answer: Local law enforcement officers who encounter an alien absconder who has been entered into NCIC follow the same procedure as for all individuals listed in NCIC: the law enforcement agency entering the information into NCIC is contacted. In alien absconder cases, the INS is notified through the Law Enforcement Support Center (LESC), a 24-hour operation located in Burlington, Vermont. The LESC reviews each case before entering it into NCIC.

Although not specifically designed to target criminal aliens, the Absconder Apprehension Initiative has produced some significant criminal alien-related arrests involving individuals from high-risk countries. As of November 29, 2002, 1,964 of the alien absconders had been entered into NCIC; 914 had been apprehended. Seventy-four of these apprehensions were from NCIC hits and the other 840 were INS field fugitive operations. We refer you to the Department of Homeland Security (DHS) for further statistics.

The involvement of other law enforcement agencies through the use of NCIC is appropriate for this initiative because alien absconders have violated criminal law by wilfully failing to appear for deportation. This mission is certainly "narrrow" because the former INS (now DHS) is seeking the assistance of local law enforcement in the apprehension of specific, known, individuals who present either a national security or law enforcement threat.

The Department of Justice has initiated discussions with state and local law enforcement officials and the organizations which represent them. Meetings and conference calls have focused on the needs local law enforcement face when assisting with immigration enforcement. Discussions are ongoing and the Department continues to work with local officials to address questions and concerns that arise

Biden 4. **I have heard members of your Administration say repeatedly that to secure the homeland, we need to secure the hometown. I couldn't agree more. The people who secure the hometown are the men and women of our police departments. I am deeply concerned that we asking local law enforcement to do too much with too little, particularly when looked at in the context of your budget for state and local law enforcement.**

Your budget proposes to decrease funds for state and local law enforcement by 37% -- from $4.9 billion in funds last year to just over $3 billion in your budget. You propose to end the COPS hiring program, the only initiative in the entire federal government that helps hire police officers. I am glad we were able to work with Chairman Hollings to restore these cuts in the bill Chairman Byrd reported to the full Senate recently.

Are you aware that, of the 18,000 law enforcement agencies in the country, one-third has never received a COPS grant? COPS currently has $430 million worth of hiring grant applications, yet they only have $120 million to award. Is it the Administration's view that we have reached the end of the public safety benefits that can accrue if more police are added to the streets?

You are right when you have said in the past that the 3-year COPS grants are structured so that the federal contribution ends once the grant expires. The program has worked as advertised – You have testified that fully 92 percent of all COPS grantees keep their officers on staff once the grant expires. But how does that justify eliminating the program for the approximately 6,000 police departments who have never received a COPS grant? Isn't that 92% statistic a testament to the effectiveness of the "seed money" concept of the program?

Answer: In attempt to realign and streamline all of the Department of Justice's state and local law enforcement grant programs, the Department is recommending the creation of a comprehensive state and local assistance grant program: Justice Assistance Grant Program (JAG).

The JAG, a new $800 million initiative incorporating funds from the Byrne and Local Law Enforcement Block Grant programs, will provide flexible funds to

both state and local law enforcement. This new program will provide states and localities the means to bridge whatever law enforcement gap they might have - be it new technology or equipment, overtime payments, or other law enforcement programs.

The Administration is committed to providing the aid and resources needed by our state and local partners in a flexible and efficient manner.

The FY03 budget request for COPS dedicates resources to critical areas for state and local law enforcement, aside from hiring grants. The COPS '03 budget will provide funds for law enforcement technology, to combat methamphetamine, increase the law enforcement infrastructure in Indian Country and to advance community policing and police integrity.

Biden 5. **On May 29th, Director Mueller announced his proposed FBI reorganization plan and stated that 518 FBI agents would be shifted from crime and drug activities to counterterrorism. Specifically, 400 drug agents, 59 white-collar crime agents, and 59 violent crime agents would be moved out of their current responsibilities. 480 agents would be shifted to counterterrorism duties in the field, and 38 would be moved to FBI Headquarters for new counterterrorism duties. Director Mueller, in testimony in the other body on June 21st, states his view that the impact of these shifts on state and local law enforcement would be "relatively minor."**

Last week, the Director addressed the National Organization of Black Law Enforcement Executives. He told that organization that local police can expect to see fewer agents helping them in white-collar crime cases, violent crime cases, and with bank robberies.

What is the status of Director Mueller's reorganization plan? How many FBI agents have been reassigned since September 11th, 2001? From which FBI components have they been taken? To which FBI components have they been assigned?

Answer: Congressional clearance for the reorganization plan was received in late July 2002. The FBI is in the process of implementing the actions proposed in the notification to Congress. FBI field offices have been notified of revised agent staffing levels that reflect the redirection of field agents. Attached is a chart (dated November 2002) that shows the redirection of the 480 field agents[3].

What impact do you envision the reorganization having on our efforts to

[3]Attachment D

fight violent and drug crime? Do we need to add resources to our state and local partners so that they can adequately fill any gaps resulting from the redeployment of FBI agents? If not, why not?

Answer: The reprogramming of the FBI's direct funded drug resources to address counterterrorism and other priority matters has significantly reduced the FBI's involvement in drug investigations and resulted in an increased investigative burden on DEA and other federal, state, and local law enforcement agencies already heavily tasked with homeland security responsibilities. These reductions come at a time when the drug trafficking criminal enterprises activities are expanding. The reallocation has led to a decrease in the overall intelligence base of the FBI and a decline in the number of Title III wiretaps, undercover operations, and statistical accomplishments. Field offices have eliminated or consolidated drug squads with organized crime, violent crime, and/or money laundering programs. Some were forced to withdraw from ad hoc task force operations. Additionally, drug program resources were refocused from smaller Resident Agencies to larger metropolitan areas to address the higher volume of drug trafficking enterprises in those locations. These reductions have challenged the FBI's ability to fully address the most significant national/regional/local, as well as the domestic components of transnational, drug trafficking enterprises operating in each field office's territory.

The reallocation of drug program resources will also significantly reduce the number of non-OCDETF investigations initiated and later converted to OCDETF matters. The Department of Justice's OCDETF Program is the cornerstone of the FBI's drug program. Historically, the FBI has utilized its direct funded special agent positions to initiate non-OCDETF investigations, which, consistent with the FBI's drug program plan, to dismantle the domestic components of the drug trafficking criminal enterprises posing the greatest threats to the U.S., predicate the initiation of OCDETF matters. State and local agencies, who work in partnership with the FBI, contribute personnel in proportion to the number of FBI Agents assigned. Thus, the participation of state and local law enforcement agencies with counter-narcotics responsibilities may also be reduced.

These reductions also come at a time when the FBI is expanding its leadership in newly approved HIDTAs. HIDTAs are joint efforts of local, state and federal law enforcement agencies, desgnated and funded by ONDCP in furtherance of the National Drug Control Strategy, to assess regional drug threats, design strategies to combat the threats, and develop initiatives to implement the strategies. The FBI must now face these serious crime issues and an expanding leadership role with a diminished manpower base.

Adding resources to our state and local partners will not fill the void resulting

from the redeployment of FBI agents. The FBI provides state and local agencies with the resources necessary to successfully investigate and prosecute multijurisdictional or transnational drug trafficking organizations.

Biden 7. **Director Mueller's reorganization plan entails moving 400 FBI agents off of drug cases and into counterterrorism cases. That means a 28 percent cut in the number of FBI agents working drug cases (going from 1,400 to 1,000 agents). DEA Administrator Asa Hutchinson has said his 4,600 DEA agents are ready to pick up the slack and I am confident that they will do an outstanding job. But the DEA will need more money to compensate for the work that FBI agents had been doing in the past.**

I would hope that additional funding for the DEA was something that has been discussed within the Administration as the reorganization plan was being formulated. Where does additional funding for DEA stand? Is this something that you are going to push for within the Administration?

It would cost somewhere near $100 million to hire 400 new agents at the DEA. Will you support that level of funding increase or will it be something less than that?

Answer: Director Mueller reprogrammed 567 direct funded agents from the drug program to counterterrorism and other priority matters. The reprogramming was intended to eliminate the investigative overlap between federal, state, and local law enforcement agencies investigating the same drug trafficking criminal enterprises, so that the FBI could concentrate their greatest assets on their core mission of counterterrorism. None of the redirection was applied against the FBI's involvement in interagency Organized Crime Drug Enforcement Task Force (OCDETF) investigations. The Department of Justice's OCDETF Program remains the cornerstone of the FBI's drug program. The FBI is committed to OCDETF and to the High Intensity Drug Trafficking Area (HIDTA) Task Forces and will continue to focus on dismantling the largest drug-trafficking organizations and criminal enterprises identified on the Attorney General's list of Consolidated Priority Organization Targets. The FBI will continue to work with the DEA and other federal, state and local agencies to ensure that the redirection of FBI personnel does not negatively affect current investigations or cases dependent on FBI involvement. In addition, the Department received funding in FY 2003 to support additional DEA agent positions, and these agents will be deployed to areas impacted by the FBI redirection. The President's FY 2004 budget also seeks significant enhancements for additional DEA positions.

Biden 9. **Recently, I introduced the Reducing Americans' Vulnerability to Ecstasy Act, also know as the RAVE Act. The bill amends the so-called "crack house**

statute" to help federal prosecutors crack down on rogue rave promoters who seek to profit by exploiting and endangering kids. I appreciate the support that the Justice Department has given the legislation.

Since my bill was unanimously reported out of the Judiciary Committee a few weeks ago, there has been a great deal of discussion about the bill. Some of the charges that have been made by its opponents are that innocent business owners will be prosecuted if one of the patrons at their clubs happens to use drugs and that an individual could be prosecuted if a guest at a backyard barbeque uses drugs. I have been trying to convince people that the bill does not hold club promoters or home owners accountable for the behavior of their patrons or guests. Rather, the criminal provisions of the bill are aimed at the behavior of rogue rave or other club promoters.

If the promoter is an upstanding citizen who is not doing anything to encourage drug use among their clients, then they have nothing to fear. But if a promoter is organizing an event for the purpose of illicit drug use or distribution – which is a fairly difficult thing for a prosecutor to prove – then they have reason to worry.

Can you provide some clarification on this matter and reassure concert promoters, club owners, and others that the Department of Justice will not seek to hold them accountable for the actions of a few patrons but that you will seek to prosecute them if they are holding their events for the purpose of drug use or distribution?

Answer: The "Reducing Americans' Vulnerability to Ecstasy Act of 2002" or RAVE Act, S. 2633 in the 107th Congress, was included in practically identical form in recently passed legislation. It is part of the "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003," the PROTECT Act, S. 151 (conference version), section 608, which is known as the "Illicit Drug Anti-Proliferation Act of 2003." The passage of this Act brings about an important improvement in the law aimed at protecting those who frequent raves and similar events. While opponents of this legislation have raised concerns that innocent persons could be held criminally liable for the illegal acts of their guests or patrons, these concerns are unfounded because the Act - like the prior law - has an important intent element that limits its scope significantly. It only criminalizes the actions of business owners and others that are knowingly undertaken for the purpose of unlawful drug activity, such as manufacturing, distributing, or using any controlled substance. The bill expands the list of prohibited acts but does not change the intent standard of the prior law. A person who knowingly maintains or rents a place to carry out the illegal purpose would violate the law. Similarly, a person who manages or controls a place as an owner or occupant, for example,

and who knowingly and intentionally profits from it for the purpose of illegal drug activity by others would violate the law as well. A club owner who has not acted in a knowing manner for the purpose of furthering unlawful drug activity or has not made himself willfully blind to such activity would not possess the requisite intent to violate the prior or current law.

Biden 10. **On May 14th, I chaired a Crime and Drugs Subcommittee hearing on using DNA technology to fight crime, particularly sexual assault crimes. Dr. Dwight Adams, Director of the Laboratory Division at the FBI, and Sarah Hart, Director of the National Institute of Justice, testified about the Department's efforts to promote the use of DNA analysis to solve crimes.**

During the hearing, I discussed my DNA Sexual Assault Justice Act of 2002, S. 2513, with Dr. Adams and Ms. Hart and explicitly asked for their feedback and input on the bill.

Two days letter, on May 16th, I sent you a letter enclosing a copy of the legislation in the hope that we could work together to move the bill forward.

I still have not received the Department's views on S. 2513, and I would appreciate a response to my May 16th letter to you as soon as possible.

Answer: The Department provided its views on S. 2513 in a letter dated November 25, 2002[4].

Grassley 1. **Regarding the sharing and analysis of intelligence information, please explain how the FBI will interact with the new Department of Homeland Security and other entities engaged in protecting America from acts of terrorism, such as the Foreign Terrorism Tracking Task Force. Have we gone far enough in this reorganization plan? I understand that there has been discussion regarding the possibility of moving the Foreign Terrorist Tracking Task Force to the new Department of Homeland Security. Do you think this to be a good idea?**

Answer: Since the Department of Homeland Security (DHS) became fully operational on March 1, the FBI has had interaction with various DHS components on many levels. The majority of the interaction relates to specific investigations. The FBI has established interagency Joint Terrorism Task Forces in all of its 56 field offices; DHS's Bureau of Immigration and Customs Enforcement (ICE) participant in the JTTFs. In addition, the FBI has established an interagency National Joint Terrorism Task Force (NJTTF) at FBI Headquarters, and ICE agents are also detailed to FBI's Counterterrorism Division. The FBI interacts

[4]Attachment C

with DHS through the Foreign Terrorist Tracking Task Force's (FTTTF), as the FTTTF and DHS share information about individuals of potential concern. DHS requests that the FTTTF provide information on specific individuals, and the FTTTF provides lead information back to DHS and also to FBI offices as appropriate. The FBI and DHS are also sharing information more broadly pursuant to an information-sharing memorandum of understanding signed by the Department of Justice, DHS and other agencies. Finally, the recently announced establishment of the Terrorist Screening Center (TSC), which will become operational in December 2003, will provide the FBI and DHS additional opportunities to interact, as all the watchlists of the federal government will have been integrated. The TSC is co-located with the FTTTF, led by an assignee from DHS, and will have deputy and associate directors from DHS, the Department of State, and the FBI.

With regard to the location of the FTTTF, we believe that the FTTTF is appropriately located in the FBI's Counterterrorism Division. Consistent with the original Presidential order creating the FTTTF, the Director of the FTTTF reports both to the Director of the FBI and to the Deputy Attorney General, which promotes coordinated information sharing with the highest levels of the Department of Justice. The location of the FTTTF is consistent with the FBI's efforts to strengthen its entire intelligence apparatus, and will maximize a number of unique core competencies of the FTTTF. One of the FTTTF's core functions is to provide information that locates or detects the presence of known or suspected terrorists within the United States by exploiting public and proprietary data sources to find an "electronic footprint" of known and suspected terrorists. The FTTTF provides day-to-day support to the Counterterrorism Division and JTTFs in locating known and suspected terrorists and is an integral part of FBI counterterrorism operations. Hence, it is our belief that the FTTTF belongs within the Department of Justice and the FBI so that it can continue to provide direct support to counterterrorism investigations.

Grassley 4. **In the case of the FBI, will the current full time employees dedicated to NIPC be moved to the new Department, in addition to the numerous detailees? What transition provisions have been made to ensure a smooth and complete transition?**

Answer: On March 1, 2003, the FBI transferred a portion of the National Infrastructure Protection Center (NIPC) to the Department of Homeland Security (DHS). The NIPC entities that were transferred are the NIPC front office, the Analysis and Warning Section, and the Training, Outreach and Strategy Section. The Computer Intrusion Section (formerly the Computer Investigations and Operations Section) will remain in the FBI under the Cyber Division to investigate all computer intrusion cases.

As part of this transfer, up to 29 support personnel will become Department of Homeland Security employees. There are also 43 military reservists, 11 Other Governmental Agency (OGA) employees and 36 contractors that reported to the DHS as of March 9, 2003.

Continuity of operations will be maintained through the combination of transferred employees, military reservists, OGA detailees and contractors. In addition, working groups, consisting of FBI and DHS employees, have been established to manage the transition. Those personnel who are transferred to the DHS will be provided administrative support, office space and connectivity to appropriate FBI systems until DHS facilities and support mechanisms have been established.

Durbin 15. **Is it reasonable to conclude that many of the September 11 detainees were known prohibited persons ineligible to purchase firearms under federal law?**

Answer: Under 18 U.S.C. 922(g), the following classes of person are prohibited from receiving or possessing a firearm:

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
(2) who is a fugitive from justice;
(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
(5) who, being an alien--
  (A) is illegally or unlawfully in the United States; or
  (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
(6) who has been discharged from the Armed Forces under dishonorable conditions;
(7) who, having been a citizen of the United States, has renounced his citizenship;
(8) who is subject to a court order that--
  (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
  (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child;

and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence.

In addition, 18 U.S.C. 922(n) prohibits any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship, transport, or receive a firearm. A person detained in connection with the September 11th investigation who meets one of these statutory disqualifying criteria would be prohibited from receiving or possessing a firearm under federal law.

In February 2002, so that the NICS could better enforce the prohibition relating to aliens in section 922(g)(5), I directed the FBI and the INS (now the Bureau of Immigration and Customs Enforcement (ICE)) to immediately begin checking immigration records on persons identified as aliens attempting to buy guns. When the ICE indicates to the NICS that the alien is illegally or unlawfully in the United States, the firearm transfer is denied. In tandem with my directive and to better facilitate a NICS check of immigration records, on February 19, 2002, the ATF began using a revised version of their Form 4473, which must be filled out prior to the purchase of a firearm. The revised version captures the required additional immigration-related information, including the prospective gun purchaser's country of citizenship, whether the person is a non-immigrant alien, and, in the case of individuals who are not U.S. citizens, the person's INS (now ICE) issued alien number or admission number.

Attachment A

THE WHITE HOUSE
WASHINGTON
FOR OFFICIAL USE ONLY

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources,

REDACTED

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;

(2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;

(3) Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;

(4) Mr. Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and

(7) it is, REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.

DATE: June 9, 2002

Attachment B

No. 02-7338

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI, et al.,

Petitioners-Appellees,

v.

DONALD RUMSFELD, et al.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR RESPONDENTS-APPELLANTS

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IN THE UNITED STATES COURT OF APPEALS
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BRIEF FOR RESPONDENTS-APPELLANTS

JURISDICTIONAL STATEMENT

Petitioners invoked the jurisdiction of the district court under 28 U.S.C. 2241. On August 16, 2002, the district court entered an order (J.A. 425-439)[1] holding that the government's return and supporting declaration (J.A. 34-62) are insufficient to

[1] The principal record materials referred to in this brief are included in the Joint Appendix. The first time such materials are discussed in the text, we refer to the place in the appendix where the materials may be found.

warrant dismissal of the habeas petition in this case, and requiring respondents to produce sensitive national-security materials concerning the detainee at issue for the court's ex parte, in camera review. On August 21, 2002, the district court certified for appeal under 28 U.S.C. 1292(b) the first question quoted below. J.A. 464. On September 12, 2002, this Court granted respondents' petition to appeal the district court's August 16 Order, and directed the parties "to address the question as certified by the district court, as well as any other issues fairly included within the certified order." Order at 2. This Court has jurisdiction under 28 U.S.C. 1292(b).

STATEMENT OF THE ISSUES PRESENTED

1. The district court certified the following issue for appeal:

> Whether the Mobbs declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

2. Whether the district court properly concluded that the government's return and supporting declaration are insufficient to establish the legality of Hamdi's detention as a captured enemy combatant.

3. Whether the district court properly ordered respondents to produce, for ex parte, in camera review, the additional materials concerning Hamdi, including raw notes and statements derived from intelligence-gathering interviews.

STATEMENT OF THE CASE

This case, with which this Court already is familiar, challenges the exercise of the Executive's core war powers at a time when the Nation is engaged in armed conflict abroad and seeking to defend the homeland from additional attack by an unprincipled and unconventional enemy. Yaser Esam Hamdi, the detainee at issue in this case, was captured by allied forces in Afghanistan, after he surrendered with a Taliban unit while armed with an AK-47 assault rifle. The United States military has determined that Hamdi should be detained as an enemy combatant in accordance with the well-settled laws and customs of war.

Petitioners admit that Hamdi was in Afghanistan – a zone of active military operations – when he was captured, and do not challenge the military's decision to detain him in Afghanistan. Pet. ¶ 9; Pet. Traverse at 2. But they claim that Hamdi's current detention violates the Fifth and Fourteenth Amendments to the Constitution, and seek his release. Pet. ¶¶ 22-23. Before the respondents had an opportunity to respond to that claim on the merits, the district court ordered that the public defender be granted private, unmonitored access to Hamdi. This Court reversed that order and remanded for additional proceedings. Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002). In doing so, the Court stated that "[i]t has long been settled that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the

government's present detention of him is a lawful one." Id. at 283.

On remand, the government filed its return and moved to dismiss the petition on the ground that Hamdi is indeed such an enemy combatant. In support of its return, the government submitted the sworn declaration (J.A. 61-62) of a Department of Defense official explaining the circumstances underlying the military's enemy-combatant determination. On August 16, 2002, the district court issued an order finding the government's submission insufficient to justify Hamdi's detention, and requiring production of additional materials, including copies of statements and raw notes from intelligence interviews of Hamdi conducted by the military. The district court's August 16 Order disregards the cardinal principles of separation-of-powers recognized by this Court's prior decision in this case, and should be reversed.

A. Factual Background

On September 11, 2001, the al Qaeda terrorist network launched a vicious, coordinated attack on the United States, killing approximately 3,000 persons. Immediately after the attack, the President, acting as Commander in Chief, took steps to prevent additional threats. Congress then backed the President's use of force against the "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist [September 11] attacks * * * or harbored such organizations or persons." Auth. for Use of Military Force, Pub. L. No. 107-40, 115

Stat. 224 (2001). Congress emphasized that the forces responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Ibid.

The President dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported and protected that network. In the course of that extensive campaign – which remains ongoing – United States and coalition forces, including the Northern Alliance, have captured or taken control of thousands of individuals. Just as in virtually every other major armed conflict in the Nation's history, the military has determined that many of those captured in Afghanistan should be detained during the war as enemy combatants. See Decl. of M. Mobbs. ¶ 1. Such detention serves the vital objective of preventing combatants from continuing to aid our enemies. In addition, it facilitates the gathering of intelligence to further the overall war effort, and, in particular, to aid military operations and prevent additional attacks on the United States or its allies. See Decl. of D. Woolfolk at 1-2 (J.A. 145-147).

The detainee in this case, Yaser Esam Hamdi, appears to be a Saudi national who, records indicate, was born in Louisiana. He went to Afghanistan before September 11, 2001, and stayed there after the United States and coalition forces

began military operations in that country last fall. In late 2001, while Northern Alliance forces were engaged in battle with the Taliban near Konduz, Afghanistan, Hamdi surrendered – while armed – along with his Taliban unit, and was taken to a prison maintained by the Northern Alliance in Mazar-e-Sharif. Mobbs Decl. ¶¶ 3-4. Hamdi was subsequently transferred to a Northern Alliance prison in Sheberghan, where he was interviewed by a U.S. Interrogation Team. Id. ¶ 5.

Based on interviews with Hamdi and his association with the Taliban, the United States military determined that Hamdi is an enemy combatant. Mobbs Decl. ¶ 6. In Afghanistan, Hamdi told United States military authorities that he went to Afghanistan to train with and, if necessary, fight for the Taliban. Id. ¶ 5. Subsequent interviews with Hamdi likewise confirm his status as an enemy combatant. Indeed, Hamdi himself has stated that he surrendered to Northern Alliance forces and turned over his Kalishnikov (i.e., AK-47) assault rifle to them. Id. ¶ 9.

In addition, United States military authorities concluded that Hamdi met the criteria established by the Department of Defense for determining which of the captured combatants in Afghanistan should be placed under United States military control. Mobbs Decl. ¶ 7.[2] Pursuant to an order of the U.S. Land Forces Commander

[2] The screening criteria themselves are classified. As explained below (pp. 39-40, infra), although respondents do not believe that review of those criteria is necessary to the resolution of this case, respondents offered to file, ex parte and under

in Afghanistan, Hamdi was transferred from Sheberghan to a U.S. detention facility in Kandahar. Id. ¶ 7. Following a separate military screening in January 2002, Hamdi was transferred from Kandahar to the Naval Base at Guantanamo Bay, Cuba. Id. ¶ 8. In April 2002, after military authorities learned of records indicating that Hamdi was born in Louisiana, Hamdi was transferred to the Norfolk Naval Brig.

B. Procedural History

In June 2002, the detainee's father, Esam Fouad Hamdi, filed this habeas action on behalf of his son as his "next friend." Pet. ¶ 1.[3] The petition (J.A. 8-29) acknowledges that Yaser Hamdi was residing in Afghanistan when he was taken into control of the United States military. Id. ¶ 9. But the petition alleges that, "[a]s an American citizen, [Hamdi] enjoys the full protections of the Constitution," and that Hamdi's detention without charges or counsel "violate[s] the Fifth and Fourteenth Amendments to the United States Constitution." Id. ¶¶ 22, 23. That claim, petitioners stress, does not "implicate Respondents' initial detention of [Hamdi] in Afghanistan," but instead challenges "only" his detention in Norfolk. Pet. Traverse

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seal, additional information concerning the criteria with the district court. The district court refused that offer, Tr. of Aug. 20, 2002 Hrg. at 22-23 (J.A. 461-462), but respondents remain willing to provide the Court with the criteria.

[3] Two previous habeas petitions were filed on behalf of Hamdi. In accordance with this Court's decision in Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002), those petitions were dismissed for lack of jurisdiction.

at 2. The petition seeks Hamdi's release and certain other relief. See id. at 7.[4]

Before respondents had been served with the petition, the district court appointed the federal public defender as "counsel for the Petitioner," and ordered respondents to allow the public defender to meet with Hamdi in private. June 11, 2002 Order at 2-3. Respondents appealed the June 11 Order (J.A. 30-33), and this Court stayed "all proceedings before the district court" involving Hamdi. On July 12, 2002, the Court reversed the district court's June 11 Order, and remanded for further proceedings. 296 F.3d 278. The Court specifically instructed that, "[u]pon remand, the district court must consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." Id. at 284.

On July 18, 2002, before this Court had issued the mandate or lifted the stay in connection with the prior appeal, the district court ordered respondents to file their return by July 25.[5] While objecting to the district court's effort to proceed before the

[4] The petition also alleges that, "[t]o the extent that [the President's Order of November 13, 2001] disallows any challenge to the legality of [Hamdi's] detention by way of habeas corpus, the Order and its enforcement constitute an unlawful suspension of the Writ." Pet. ¶ 25. As respondents have explained, however, the President's Military Order has no application to Hamdi in his present situation, see Return at 14, and petitioners appear to have abandoned that claim.

[5] The district court proceedings on remand from this Court's prior decision are described in more detail in Respondents-Appellants' Opposition to Petitioners-

mandate had issued and in the face of this Court's stay, respondents filed a combined return and motion to dismiss (J.A. 34-62). That filing included the sworn declaration of the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs, who has been substantially involved with issues related to the detention of enemy combatants in connection with the current war. The Mobbs Declaration (J.A. 61-62) explained the circumstances surrounding Hamdi's capture and the military's determination to detain him as an enemy combatant. See pp. 5-6, supra.

On July 31, 2002, after receiving petitioners' traverse and response to respondents' motion to dismiss (J.A. 63-128), the district court set a hearing for August 8. July 31 Order at 1. In addition, the district court's July 31 Order (J.A. 141-142) directed respondents to produce by August 6, "for in camera review by the Court," specified materials concerning Hamdi "redacted to protect any intelligence matters not within the scope of this inquiry into Hamdi's legal status." July 31 Order at 1. In particular, the court demanded "[c]opies of all Hamdi's statements, and the notes taken from any interviews with Hamdi"; the names and addresses of "all the interrogators who have questioned Hamdi"; "statements by members of the Northern Alliance regarding [Hamdi]"; a list of "the date of Hamdi's capture" and "all the dates

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Appellees' Motion to Dissolve Stay in No. 02-6895, at 3-6. Appended to that opposition are copies of the relevant orders and hearing transcripts.

and locations of his subsequent detention"; and the identity of the government official, or officials, who made certain determinations with respect to Hamdi's detention as an enemy combatant. Id. at 1-2.

On August 5, 2002, respondents moved for relief from the district court's production order, explaining, again, that the court lacked authority to act before this Court issued its mandate and lifted the stay in the prior appeal, and that the court's production demands were inconsistent with the terms of this Court's prior decision. Before the district court acted on that motion, petitioners asked this Court to dissolve the stay of "all proceedings." On August 8, this Court issued an order dissolving the stay and issuing the mandate in the prior appeal. The Court further directed the district court to "proceed in strict compliance with our July 12, 2002 decision." Aug. 8 Order at 1. "In accordance with the principles set forth in that opinion," the Court further directed the district court to "consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further." Id. at 2.

On August 13, 2002, the district court held a hearing (see J.A. 325-424) during which it repeatedly stated its intent to take the Mobbs Declaration "piece by piece," Tr. of Aug. 13, 2002 Hrg. at 9, 27, 31, and to "pick it apart," id. at 41. The court stated that it did not have "any doubts [Hamdi] went to Afghanistan to be with the Taliban," and that he "had a firearm" when he surrendered. Id. at 51; see id. at 72

("He was there to fight. And that's correct."). But the court had numerous questions about the declaration, including whether there is "anything in the Mobbs' Declaration that says Hamdi ever fired a weapon?," id. at 9; see id. at 43; whether "Mr. Mobbs [is] an employee of the United States?," id. at 10; see id. at 41, 90; "[w]hat does affiliation mean?," id. at 13; see id. at 37; and "what distinguishes a Northern Alliance unit from a Taliban unit?," id. at 40. In addition, the court expressed concern that Hamdi was not being detained in accordance with certain armed services regulations, and that a "military tribunal" should be convened. See id. at 17-23, 32-33, 43, 82-83, 100.

On August 16, 2002, the district court issued an order finding the government's return and supporting declaration "insufficient" to justify Hamdi's detention. Order at 2. The court stated that "[a] thorough examination of the Mobbs declaration reveals that it leads to more questions than it answers," id. at 9, and that it is "necessary to obtain the additional facts requested." Id. at 14. The court further ordered respondents to produce for its ex parte, in camera review, the materials previously demanded in its July 31 Order, together with the screening criteria that respondents had offered in their return to provide the court but explained were not necessary for it to review to dispose of this case. Id. at 2; see note 2, supra.

On August 21, 2002, the district court certified for appeal the question quoted on page 2, supra, concerning the sufficiency of the Mobbs Declaration. On

September 12, 2002, this Court granted respondents' petition to appeal the August 16 Order, and all "issues fairly included within th[at] order." Order at 2.

SUMMARY OF ARGUMENT

The district court's August 16 Order should be reversed and the case dismissed.

I. In concluding that the government's return and supporting declaration are insufficient to justify Hamdi's detention, the district court disregarded the fundamental separation-of-powers principles on which this Court's prior decision was grounded. In our constitutional system, the responsibility for waging war is committed to the political branches. The United States took control of Hamdi in Afghanistan while waging a military campaign launched by the Commander in Chief, with the express statutory support of Congress. The military's determination to detain him as an enemy combatant therefore is entitled to the strongest possible constitutional weight and, in fact, this Court already has stated that "if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." Hamdi, 296 F.3d at 283.

The government has shown that Hamdi is such an enemy combatant. The sworn declaration accompanying the return explains, inter alia, that Hamdi surrendered with an enemy unit in the theatre of battle while armed with an AK-47. Hamdi is thus a prototypical battlefield combatant subject to capture and detention

in war. And the declaration accordingly satisfies any constitutionally appropriate standard of review in this case. Such review must reflect the Constitution's textual commitment of the conduct of war to the political branches. Indeed, in reviewing habeas challenges to executive determinations much less constitutionally sensitive than the fundamental military judgment at issue here, courts have only called upon the Executive to provide "some evidence" to support its determinations. The Mobbs Declaration more than satisfies that standard.

In reaching a contrary conclusion, the district court applied a hyper-critical standard of review antithetical to the "great deference" that this Court itself called for in its prior decision. Hamdi, 296 F.3d at 281. Far from proceeding with the requisite deference, the district court declared that it was "challenging everything in the Mobbs Declaration," Tr. of Aug. 13 Hrg. at 27, and then set out to "pick it apart," id. at 31. The nature and number of alleged deficiencies identified by the court underscore how far it strayed from this Court's instructions, and well illustrate the "special hazards" foreseen by this Court with respect to "judicial involvement in military decision-making." Hamdi, 296 F.3d at 283. What is more, despite all that, even the district court did not have "any doubts [Hamdi] went to Afghanistan to be with the Taliban" and "had a firearm" when he surrendered. Tr. of Aug. 13 Hrg. at 51. That speaks volumes about the factual showing that the government did make.

The district court's conclusion that the government's submission is insufficient is inexplicable in another respect. The court acknowledged that "[p]etitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities" was lawful. Aug. 16 Order at 8. Hamdi's status as an enemy combatant did not change when he left Afghanistan. Nor did that transfer obligate the armed forces to assemble additional evidence or satisfy a more demanding standard to continue to hold him as an enemy combatant in a more secure environment.

II. The district court's sweeping production order stems from a failure to recognize the same separation-of-powers principles. The materials demanded by the court include information that directly implicates sensitive national security matters concerning the conduct of an ongoing war, potential intelligence in the hands of the enemy, and military decisionmaking with respect to the appropriate facilities for detaining the enemy. More fundamentally, the production order confirms that the district court is applying a de novo standard of review to the military's battlefield judgments, and is preparing to conduct a full-blown evidentiary proceeding, in which the military personnel who have interviewed Hamdi may be called as witnesses. As this Court has recognized, that kind of judicial inquiry "would stand the warmaking powers of Article I and II on their heads." Hamdi, 296 F.3d at 284.

III. By rejecting the adequacy of respondents' return and accompanying

declaration and ordering the production of additional factual materials, the district court's August 16 Order necessarily rejects respondents' motion to dismiss. That decision, too, is erroneous, and this Court should reverse the district court's order and remand with instructions to dismiss the petition outright. Although the district court and petitioners have raised certain additional, purely legal objections to Hamdi's detention, this Court may readily dispose of those arguments in this appeal. Remanding the case for consideration of those legal arguments or any other proceedings would only unnecessarily prolong this litigation, and in all likelihood invite the need for further appellate superintending by this Court. The military has shown that Hamdi's detention is lawful. The case should come to an end.

STANDARD OF REVIEW

This appeal presents legal issues concerning the appropriate role of the courts in reviewing the military's detention of a captured enemy combatant in wartime. In particular, the Court must determine whether the district court erred as a matter of law in concluding that the government's return and supporting declaration are insufficient to justify the challenged detention, and that production of the additional materials demanded by the court is necessary or proper. The Court reviews de novo such questions of law. See Farmer v. Employment Sec. Comm'n of N.C. 4 F.3d 1274, 1279 (4th Cir. 1993); Jordan v. Southern Ry. Co., 970 F.2d 1350, 1352 (4th Cir.

1992); see also United States v. Brown, 155 F.3d 431, 433 (4th Cir. 1998).

ARGUMENT

THE DISTRICT COURT'S AUGUST 16 ORDER SHOULD BE SET ASIDE

As this Court recognized in its prior decision in this case, this habeas action "arises in the context of foreign relations and national security, where a court's deference to the political branches of our national government is considerable." Hamdi, 296 F.3d at 281; accord Thomasson v. Perry, 80 F.3d 915, 924-926 (4th Cir.), cert. denied, 519 U.S. 948 (1996); Tiffany v. United States, 931 F.2d 271, 277-278 (4th Cir. 1991). The action challenges the authority of the Commander in Chief and the armed forces under his command to detain an enemy combatant captured in a zone of active combat operations in a foreign land during an ongoing armed conflict. That exercise of Executive authority falls within the President's core war powers and, with respect to the present conflict, and is also supported by the express statutory endorsement of Congress. Hamdi, 296 F.3d at 281-282.

The extraordinary context in which this action arises informs the proper role of the courts in adjudicating the petition at issue. As this Court has emphasized, in our constitutional system, "[t]he executive is best prepared to exercise the military judgment attending the capture of alleged combatants." Hamdi, 296 F.3d at 283; see ibid. ("[T]he conduct of combat operations has been left to [the political branches].")

(citing Ex parte Quirin, 317 U.S. 1, 25-26 (1942)). Accordingly, courts owe "great deference" to "military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle." Id. at 281. So too, "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack." Id. at 283; see id. at 284.

In the prior appeal, this Court concluded that "[i]t was inattention to these cardinal principles of constitutional text and practice that led to the errors" in the district court's June 11 Order. Hamdi, 296 F.3d at 282. As explained below, the August 16 Order at issue in this appeal stems from the district court's inattention to the same "cardinal principles," and it should also be set aside.

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE RETURN AND SUPPORTING DECLARATION ARE INSUFFICIENT

The district court's conclusion that the government's return and accompanying declaration are insufficient to justify Hamdi's detention is tainted by two overriding, and interrelated, legal errors. First, the court openly resisted the settled legal principles recognized by this Court – in this case – concerning the military's authority to detain captured combatants in wartime, and the limited role of the courts in

reviewing such determinations. Second, rather than affording the Mobbs Declaration the requisite deference, the district court attacked it with open hostility, even to the point of questioning whether Mr. Mobbs actually works for the Department of Defense. As explained below, under any constitutionally appropriate standard of review, the declaration provides a more than adequate basis for the military's determination that Hamdi is an enemy combatant.

A. The Military's Detention Of Enemy Combatants In Connection With Ongoing Hostilities, Including The Current Conflict, Is Lawful

In the prior appeal, this Court stated that "[i]t has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." Hamdi, 296 F.3d at 283. That statement is correct, and controls the outcome in this case.

1. As this Court recognized in the prior appeal, the military's authority to detain enemy combatants during hostilities is supported by the Constitution, Supreme Court and lower court precedent, the laws and customs of war, and, with respect to the current conflict, the express statutory authorization of Congress. See Hamdi, 296 F.3d at 281-283; see also U.S. Const. art. II, § 2; Auth. for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Quirin, 317 U.S. at 30-31 & n.8; Duncan v. Kahanamoku, 327 U.S. 304, 313-314 (1946); In re Territo, 156 F.2d 142, 145 (9th

Cir. 1946); Ex parte Toscano, 208 F. 938, 940 (S.D. Cal. 1913); L. Oppenheim, International Law 368-369 (H. Lauterpacht ed., 7th ed. 1952).[6]

It is similarly settled that the military's authority to detain an enemy combatant is not diminished by a claim, or even a showing, of American citizenship. See Hamdi, 296 F.3d at 283 (parenthetical discussing Quirin, 317 U.S. at 31); see also Quirin, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful"); Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) ("[T]he petitioner's citizenship in the United States does not * * * confer upon him any constitutional rights not accorded any other belligerent under the laws of war."), cert. denied 352 U.S. 1014 (1957); In re Territo, 156 F.2d at 144 ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America.").

The United States military has captured and detained enemy combatants in connection with virtually every major conflict in the Nation's history, including more

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[6] The military's authority to capture and detain enemy combatants applies to both "lawful" and "unlawful" combatants. Quirin, 317 U.S. at 30-31. Unlawful combatants, or belligerents, do not meet the requirements for status as prisoner of war under the Geneva Conventions. See id. at 31; see id. at 35. With respect to the current conflict, the President has determined that al Qaeda and Taliban detainees are unlawful combatants. See p. 41, infra.

recent conflicts such as the Gulf, Vietnam, and Korean wars. During World War II, the United States detained hundreds of thousands of prisoners of war in the United States (some of whom were, or claimed to be, American citizens) without trial or counsel. As this Court recognized in the prior appeal, the military's longstanding authority to detain enemy combatants in wartime applies squarely to the current conflict, in which the stakes are no less grave. Hamdi, 296 F.3d at 283.

2. The district court openly questioned that settled authority and expressed "reservations regarding the implications" of this Court's own statement in the prior appeal that Hamdi's detention is lawful as long as he "'is indeed an "enemy combatant" who was captured during the hostilities in Afghanistan.'" Aug. 21 Order at 5 (quoting Hamdi, 296 F.3d at 283); see id. at 7 (expressing same "reservations"). In addition, notwithstanding this Court's prior ruling, the district court suggested that the military's present detention of Hamdi raises "grave consequences for numerous Supreme Court precedents and their progeny," including, the district court believed, Riverside v. McLaughlin, 500 U.S. 44 (1991); Miranda v. Arizona, 384 U.S. 436 (1966); and Gideon v. Wainwright, 372 U.S. 335 (1963). Aug. 21 Order at 6; see Tr. of Aug. 20 Hrg. at 18 (discussing McLaughlin, Miranda, and Gideon).[7]

[7] Referring to a report issued by the American Bar Association, the district court also suggested that the government's use of the term "enemy combatant" is novel. See Aug. 21 Order at 5. In fact, however, the term was used in a similar vein

That was clear error. This Court's decision in the prior appeal – and its specific recognition that Hamdi's detention is lawful if he is an enemy combatant – is law of the case and thus binding in "subsequent stages" of this case. United States v. Aramony, 166 F.3d 655, 661 (4th Cir. 1999). Moreover, the legal principles recognized by this Court concerning wartime detentions are well-settled and in no way inconsistent with decisions such as McLaughlin, Miranda, or Gideon. Those cases, of course, involved application of criminal law and procedure. Hamdi has not been charged with any crime, or even any specific offense under the laws of war. Instead, he is being detained by the military to prevent him from continuing to aid the enemy in the ongoing war and to enable the military to gather intelligence that may assist it in seeking to defeat the enemy and protect the Nation against future attacks. It has long been recognized that such "'[c]aptivity is neither a punishment nor an act of vengeance," but rather "a simple war measure." W. Winthrop, Military Law and Precedents 788 (2d ed. 1920); see also Territo, 156 F.2d at 145 ("The object of

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by the Supreme Court more than 50 years ago in Quirin, 317 U.S. at 31, and in In re Yamashita, 327 U.S. 1 (1946). See id. at 7 ("In [Quirin], we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war."); see also id. at 11, 13 n.1, 19, 20, 24 n.10; Madsen v. Kinsella, 343 U.S. 341, 355 (1952). The term "enemy belligerent," which the Yamashita Court used interchangeably with "enemy combatant," see 327 U.S. at 9-10, 20, also is not new. See, e.g., Johnson v. Eisentrager, 339 U.S. 763, 786 (1950); Duncan, 327 U.S. at 313; see also I. Detter, The Law of War 136-137 (2d ed. 2000) (combatants).

capture is to prevent the captured individual from serving the enemy.").

The entirely different paradigm in which this case arises – wartime detention of combatants, rather than criminal punishment – provides a complete answer to the district court's reservations, and to petitioners' legal challenge. There is no obligation under the laws and customs of war for captors to charge detainees with an offense and, indeed, the vast majority of combatants seized during war are detained without charges. Similarly, there is no general right to counsel under the laws and customs of war for those detained as enemy combatants. Even under the Third Geneva Convention, detainees with prisoner-of-war status – which Hamdi lacks, see p. 41, infra – have no right to counsel to challenge their detention. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (GPW), Article 105.[8]

The Constitution does not supply any different guarantee. The Sixth Amendment applies only to "criminal prosecutions," U.S. Const. amend. VI, and therefore does not apply to the detention of enemy combatants who have not been

[8] Article 105 of the GPW provides that a prisoner of war should be provided with counsel to defend against charges brought against him in a trial proceeding at least two weeks before the opening of such trial. But the availability of that trial right only underscores that prisoners of war who do not face such charges are not entitled to counsel, or access to counsel, simply to challenge the fact of their wartime detention.

charged with any crime. Cf. Middendorf v. Henry, 425 U.S. 25, 38 (1976) ("[A] proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial."). Similarly, the Self-Incrimination Clause of the Fifth Amendment is a "trial right of criminal defendants," and therefore also does not extend to this situation. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (emphasis added).

Any suggestion of a generalized due process right under the Fifth Amendment could not be squared with, inter alia, the historical unavailability of any right to prompt charges or counsel for those held as enemy combatants. Cf. Herrera v. Collins, 506 U.S. 390, 407-408 (1993) (looking to "[h]istorical practice" in evaluating scope of "Fourteenth Amendment's guarantee of due process" in criminal procedure context); see also Medina v. California, 505 U.S. 437, 445-446 (1992); Moyer v. Peabody, 212 U.S. 78, 84 (1909). As the Supreme Court stated in Quirin, 317 U.S. at 27-28, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." As discussed above, under that well-settled body of law, the military's detention of captured enemy combatants without counsel or charges is

lawful for at least the duration of the underlying conflict.[9]

The district court did not question that the "German soldier captured at the Battle of the Bulge" was not entitled to counsel to challenge his detention. Tr. of Aug. 13 Hrg. at 26. But it inexplicably rejected application of that principle to the detainee here, who was captured as part of an enemy unit in the combat zone in Afghanistan. As this Court emphasized in the prior appeal, while the current conflict may be less conventional than prior wars, the "unconventional aspects of the present struggle" in no way divest the military of its settled authority to capture and detain enemy combatants in its effort to prevail in that struggle. Hamdi, 296 F.3d at 283.

B. The Government Has Shown That Hamdi Is Indeed An Enemy Combatant Captured During The Hostilities In Afghanistan

Although the petition itself raises legal objections to Hamdi's detention without specifically challenging Hamdi's status as an enemy combatant, the government's

[9] The district court suggested that Quirin establishes that enemy combatants enjoy much broader due process protections, including "access to counsel and the opportunity to defend [themselves] before a military tribunal." See Aug. 16 Order at 8. That is incorrect. The captured combatants in Quirin were charged with violations of the laws of war and of the Articles of War – offenses punishable by death – and tried before a military commission. 317 U.S. at 22-23. Accordingly, the saboteurs were provided counsel by the military to aid in preparing a response to those charges. Hamdi has not been charged with any offense and has not been subjected to any military trial or punishment. Quirin, therefore, provides no support for any claim to access to counsel with respect to the simple wartime detention of the detainee at issue in this case.

return and supporting declaration explain why Hamdi is indeed such a combatant. The military's determination that Hamdi is an enemy combatant is supported by common sense and an adequate evidentiary basis, and should be given effect.

1. The role of the courts in adjudicating a habeas petition filed on behalf of a captured enemy combatant is extremely limited. That is especially so when it comes to second-guessing the basic factual determination made by military forces on the ground in a foreign land that a particular individual is part of an enemy force and should be held as an enemy combatant. As this Court emphasized in the prior appeal, the enormous deference owed to the political branches in matters involving foreign relations and national security "extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle." Hamdi, 296 F.3d at 281. So too, "the standard for reviewing the government's designation of Hamdi as an enemy combatant" is shaped by fundamental "[s]eparation of powers principles." Id. at 283.

The Executive's determination that an individual is an enemy combatant is a quintessentially military judgment. See Hirota v. MacArthur, 338 U.S. 197, 215 (1949) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander in Chief, and as spokesman for the nation in foreign affairs, had the final say.")

(Douglas, J., concurring); cf. Ludecke v. Watkins, 335 U.S. 160, 170 (1948); Eisentrager, 339 U.S. at 789. Moreover, the military has a unique institutional capacity to make that determination. In the course of hostilities, the military through its operations and intelligence-gathering has an unparalleled vantage point from which to learn about the enemy, and make judgments as to whether those seized during a conflict are friend or foe. See Hamdi, 296 F.3d at 283 ("The political branches are best positioned to comprehend this global war in its full context."); see also Minns v. United States, 155 F.3d 445, 451 (4th Cir. 1998) ("[T]he 'complex, subtle, and professional decisions' of how to protect American soldiers in time of war and how to administer such protection are decisions that are 'essentially professional military judgments,' overseen by the Legislative and Executive Branches."). And the Executive is politically accountable for the decisions made in prosecuting war, and in defending the Nation. See Thomasson, 80 F.3d at 924.

Conversely, the Judiciary, as this Court itself has recognized, lacks institutional competence, experience, and accountability in making such military judgments. See Hamdi, 296 F.3d at 283 ("The executive is best prepared to exercise the military judgment attending the capture of alleged combatants."); see Thomasson, 80 F.3d at 926 ("[T]he lack of competence on the part of the courts [with respect to military judgments] is marked") (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)); Tozer

v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986) ("The judicial branch contains no Department of Defense or Armed Services Committee or other ongoing fund of expertise on which its personnel may draw. Nor is it seemly that a democracy's most serious decisions, those providing for common survival and defense, be made by its least accountable branch of government."). That lack of competence is particularly pronounced when it comes to second-guessing the military's determination that an individual seized on a battlefield in a foreign land is an enemy combatant.

At the same time, the need for judicial deference to military decisionmaking "also arises from the unique role that national defense plays in a democracy." Thomasson, 80 F.3d at 925. "[O]ur nation's very preservation hinges on decisions regarding war and preparation for war." Ibid. The military determination at issue in this case – the decision to detain someone who was armed with an assault rifle when he surrendered in a combat zone as part of an enemy unit – directly implicates the national defense, not to mention the safety of American soldiers still stationed in the zone of conflict, and falls at the heart of the military's ability to conduct war. That is especially true today, when the Nation is at war with an unprincipled enemy that has committed unspeakable atrocities on American soil and has made clear its intent to attempt additional attacks. As such, the military determination at issue here calls for extraordinary deference from the courts.

2. Proper respect for separation of powers and the limited role and capabilities of courts in matters of national security may well limit the courts to the consideration of legal attacks on detention of the type considered in Quirin and Territo, and raised by the petition in this case (see Pet. ¶¶ 21-25). At most, however, in light of the fundamental separation-of-powers principles recognized by this Court's prior decision and discussed above, a court's proper role in a habeas proceeding such as this would be to confirm that there is a factual basis supporting the military's determination that a detainee is indeed an enemy combatant. And when, as here, the Executive provides such a basis, there is no further role for evidentiary hearings or intrusive production orders aimed at reconstructing the exact circumstances surrounding an enemy combatant's capture or detention in the heat of war.

In evaluating habeas challenges to analogous – but much less constitutionally sensitive – executive determinations, courts have refused to permit use of the writ to challenge the factual accuracy of such determinations, and instead call upon the Executive only to show "some evidence" supporting its determination. See, e.g., INS v. St. Cyr, 533 U.S. 289, 306 (2001) (deportation order: "Until the enactment of the 1952 Immigration and Nationality Act, the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence

to support the order, the courts generally did not review factual determinations made by the Executive.") (citations omitted); Eagles v. Samuels, 329 U.S. 304, 312 (1946) (selective service determination: "If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, or that there was no evidence to support the order, the inquiry is at an end.") (citations omitted); United States v. Commissioner, 273 U.S. 103, 106 (1927) (deportation order: "Upon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced."); Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (extradition order: "[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."). The role of a court in such actions is limited to confirming that there was some basis for the challenged executive determination, and not to undertake a de novo determination for itself.

Similarly, in Moyer v. Peabody, 212 U.S. 78 (1909), the Supreme Court rejected the due process challenge of a person who had been detained without probable cause for months by a governor acting in his capacity of "commander-in-chief of the state forces" during a local "state of insurrection." Id. at 82. Justice

Holmes, writing for a unanimous Court, explained: "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief." Id. at 85. Pointing to Moyer, the Court in United States v. Salerno, 481 U.S. 739, 748 (1987), stated that "in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous." See also United States v. Chalk, 441 F.2d 1277, 1282 (4th Cir.) ("It is enough, we think, that there was a factual basis for the mayor's decision to proclaim the existence of a state of emergency and that he acted in good faith."), cert. denied, 404 U.S. 943 (1971).

The basic considerations underlying the limited scope of judicial review of the sorts of executive determinations involved in the foregoing cases are only magnified when the determination at issue is the military's decision that someone seized in the midst of active hostilities in a foreign land is an enemy combatant. Thus, at a bare minimum, that executive determination should be deferred to by the courts as long as the military provides a factual basis to support it.

3. Respondents here have provided an ample factual basis to support the military's determination that Hamdi is an enemy combatant. The Mobbs Declaration

explains the key events surrounding Hamdi's capture and detention. In particular, the declaration explains that Hamdi went to Afghanistan to train with and, if necessary, fight for the Taliban; stayed with the Taliban after September 11 and after the United States and coalition forces launched the military campaign in Afghanistan; and was captured when his Taliban unit surrendered to – and, indeed, laid down arms to – coalition forces. Mobbs Decl. ¶¶ 3-5, 9. The declaration further explains that Hamdi's own statements confirm that he affiliated with an enemy unit, and was armed when that unit surrendered. Id. ¶ 9; see J.A. 61-62.

As a matter of common-sense, an individual armed with an AK-47 who surrenders with enemy forces in a combat zone manifestly qualifies as an enemy combatant. Indeed, such a person is the archetypal enemy combatant. Cf. Quirin, 317 U.S. at 38 ("Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.") (emphasis added); id. at 32-33 & n. 10 (discussing unlawful enemy combatants "lurking about the posts, quarters, fortifications and encampments of the armies of the United States"); L. Oppenheim, International Law 223 (5th ed. 1935) (Citizens of even neutral states, "if they enter the armed forces of a belligerent, or do certain other things in his favour, * * * acquire enemy character."); id. at 224 ("[D]uring the World War hundreds of subjects

of neutral States, who were fighting in the ranks of the belligerents, were captured and retained as prisoners until the end of the struggle.").

Indeed, even if Hamdi had not been armed when he surrendered, it still would have been proper for the military to detain him. It is settled under the laws and customs of war that the military's authority to detain individuals in wartime extends to non-combatants who enter the theatre of battle as part of the enemy force, including clerks, laborers, and other "civil[ian] persons engaged in military duty or in immediate connection with an army." Winthrop, supra, at 789; see Detter, supra, at 135-136; GPW art. 4(A)(4), 6 U.S.T. 3316 (recognizing that individuals who can be detained as prisoners of war include "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces"); Hague Convention of 1907, art. 3, 36 Stat. 2277 ("The armed forces of the belligerent parties may consist of combatants and non-combatants" who in "case of capture" may be detained as prisoners of war).[10]

[10] In a more traditional war between nation states, all inhabitants of a belligerent nation may be treated under the laws and customs of war as enemies. See Miller v. United States, 78 U.S. 268, 310-311 (1870) (In the context of determining rights to confiscated property, "[i]t is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in the war, though they are subjects of neutral states, or even subjects or citizens of the government prosecuting the war against the state within which they reside."); Lamar,

C. The District Court's Contrary Conclusion Is A Product Of Its Own, Undue Suspicion In Reviewing The Mobbs Declaration

In concluding that the government's return and supporting declaration are insufficient to dispose of this action, the district court disregarded the fundamental separation-of-powers principles set forth in this Court's prior decision, and applied a hyper-critical, legally erroneous, and wholly inappropriate standard of review.

1. The district court disregarded the clear mandate of this Court's prior decision, as well as the authorities discussed above, and subjected the government's submission to open "suspici[on]" (Aug. 16 Order at 13), rather than the "great deference" called for by this Court's prior decision. Hamdi, 296 F.3d at 281. Indeed, the district court made clear that it was reviewing the Mobbs Declaration "piece by piece," and was "challenging everything in the Mobbs Declaration." Tr. of Aug. 13 Hrg. at 9, 27, 41. At the same time, the district court made clear that its critical approach stemmed from its frustration with this Court's order to "consider the

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Executor v. Browne, 92 U.S. 187, 194 (1875) ("In war, all residents of enemy country are enemies."); Juragua Iron Co. v. United States, 212 U.S. 297, 308 (1909) (those who reside in enemy territory "are adhering to the enemy so long as they remain with his territory"). Moreover, in a more traditional war, the combatants of the belligerent nation would wear distinctive insignia and follow the laws and customs of war. See Quirin, 317 U.S. at 35. The fact that the enemy in the current war purposely blurs the lines between combatants and non-combatants and refuses to wear distinctive insignia require if anything giving the armed forces more deference in determining who among those seized in the theatre of battle qualify as enemy combatants.

sufficiency of the Mobbs Declaration as an independent matter before proceeding further." Tr. of Aug. 13 Hrg. at 3. Thus, the district court bluntly stated, "If I'm to rely on only this [Mobbs Declaration], then I must pick it apart. * * * If you gave me the information [requested in the production order], you know, then all of this probably could have been avoided." Id. at 32 (emphasis added); see id. at 27("You have quite rightly, according to the Fourth Circuit, not given me anything evidently"); id. at 39 ("All I want is the papers. If I had seen the papers, we probably would have ended this a long time ago. Now I'm curious. I get more curious all the time.").

The district court's August 16 Order confirms its intent to "pick apart" the declaration without regard to the appropriate standard of review. For example, the court stated:

- The declaration does not state whether Mr. Mobbs is "a paid employee of the government." Aug. 16 Order at 10.
- The declaration "does not say where or by whom [Hamdi] received weapons training or the nature and extent thereof. * * * Did someone give him a weapon and say 'here's the safety and there's the trigger?'" Id. at 11 & n.5.
- The declaration "does not indicate who commanded the unit or the type of garb or uniform Hamdi may have worn when taken by the Northern Alliance." Id. at 11.
- "Whether the forces he surrendered to was [sic] led by a 'war lord' or the unidentified unit to which he was 'affiliated' was led by a 'war lord' or whether the war lords changed sides is not set forth." Id. at 12.

- "A possible inference from Hamdi's alleged statement was that he was not fighting for the Taliban when he was surrendered to the Northern Alliance forces. It does not indicate what the 'if necessary' connotes. Does it mean in self defense or did a threatened force from the Taliban make it 'necessary?'" Ibid.

The transcript of the August 13 hearing contains numerous other examples of the court's effort to pick apart the declaration, including its criticism that the declaration failed to state "that Hamdi shot at anyone." Tr. of Aug. 13 Hrg. at 9; see id. at 43.

Furthermore, the district court hypothesized that the government might have attempted to "hide things" in characterizing the military's determination that Hamdi is an enemy combatant, and stated that it was "suspicious" of assertions made in the government's sworn affidavit. See Tr. of Aug. 13 Hrg. at 39 ("[W]hen people hide things you can generally assume if it were advantageous to them they wouldn't hide it, would they?"); Aug. 16 Order at 13 ("Again, it appears that Mr. Mobbs is merely paraphrasing a statement supposedly made by Hamdi. Due to the ease with which such statements may be taken out of context, the Court is understandably suspicious of the Respondents' assertions regarding statements that Hamdi is alleged to have made."); Tr. of Aug. 20 Hrg. at 19 ("[Mr. Mobbs] would have known a lot of information which he has deliberately omitted from the declaration."). In other words, instead of deference, the court applied distrust.

The district court's unabashed refusal to review the Mobbs Declaration in accordance with the principles of judicial restraint mandated by this Court, not to mention the Constitution, in itself requires reversal of its August 16 Order.

2. None of the alleged deficiencies identified by the district court calls into question the military's determination that Hamdi is an enemy combatant. As discussed above, to prevail under a constitutionally appropriate standard, the government would at most need to provide some factual basis supporting the military's determination that Hamdi is an enemy combatant. The Mobbs Declaration does that, and more. See pp. 30-32, supra. And an examination of the perceived short-comings identified by the district court only further bolsters the conclusion that the Mobbs Declaration provides a sufficient factual basis for the military's determination that Hamdi is indeed an enemy combatant.

Declarant. The district court objected to the particular declarant in this case. As the declaration explains, however, Mr. Mobbs is "a Special Advisor to the Under Secretary of Defense for Policy," and, in that role, has "been substantially involved with matters related to the detention of enemy combatants in the current war." Mobbs Decl. ¶ 1; see 67 Fed. Reg. 35595, 35596 (May 20, 2002) (referring to position). Moreover, Mr. Mobbs has reviewed the "relevant records and reports," including Hamdi's own statements, and is "familiar with the facts and circumstances related to

the capture of [Hamdi] and his detention by U.S. military forces." Mobbs Decl. ¶¶ 2, 9. Given Mr. Mobbs's position within the Department of Defense, there is no basis for the district court's skepticism as to his federal employment status.

Mr. Mobbs himself has not determined that Hamdi is an enemy combatant. Rather, as the declaration makes clear, that determination was made by military authorities in Afghanistan under the authority of the Commander, U.S. Central Command, who oversees the combat operations there. Mobbs Decl. ¶¶ 5-8. Requiring the military to submit the testimony of the armed forces – in Afghanistan – who determined that Hamdi was an enemy combatant, or the testimony of other officials more directly engaged in the war, would unnecessarily divert the military's attention and resources from the ongoing war effort and invite the special dangers recognized by this Court and the Supreme Court. See Hamdi, 296 F.3d at 284; Eisentrager, 339 U.S. at 779 (1950) ("It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.").

Affiliation With The Taliban. The district court raised numerous questions about Hamdi's Taliban unit and his involvement in the shooting war. See Aug. 16 Order at 11-12 (declaration does not identify Hamdi's Taliban unit, "who commanded

the unit," and whether it "was ever in any battle"); Tr. of Aug. 13 Hrg. at 43 ("I don't know of any weapon he ever fired, I don't know of anything he did, other than to be present with a Taliban unit according to them."). At the same time, however, the district court stated that it did not have "any doubts [Hamdi] went to Afghanistan to be with the Taliban," and that Hamdi "had a firearm" when he surrendered. Tr. of Aug. 13 Hrg. at 51; see id. at 72 ("He was there to fight. And that's correct.").

The district court recognized that Hamdi "was present with a Taliban unit," "had a firearm," and even that he "was there to fight." Thus, despite all its misplaced suspicion, the district court itself did not doubt all that is needed, and more, to confirm the legality of Hamdi's detention. There certainly is no added legal requirement that an armed enemy combatant actually fire his gun. Indeed, it is difficult to conceive how military authorities in the field could credibly determine which members of an enemy unit did or did not fire their weapons.

Northern Alliance, Taliban, And War Lords. The district court stated concerns about the relationship between Taliban and Northern Alliance forces in Afghanistan, and the history of strife in that country involving "war lords." Aug. 16 Order at 12; see Tr. of Aug. 13, 2002 Hrg. at 16 ("The problem with the Taliban is that these are all warlords, are they not?"); see id. at 65 ("How can the Taliban distinguish themselves from the Northern Alliance?"); id. at 67-68 (discussing "history of the

area"); id. at 71 ("What worries me is [Hamdi] happened to be in one of these fiefdoms."). The district court's speculations on such matters, however, provide no basis for second-guessing the military's determination that Hamdi is an enemy combatant who affiliated with a Taliban unit. Indeed, if anything, they underscore the need for courts to defer to the judgments of the military commanders in the field, who occupy the best vantage point to evaluate such considerations and distinguish between trusted allies and those associated with the enemy.

Screening Criteria. The district court stated that the declaration fails to provide sufficient information about "screening criteria" used by the military to determine whether to continue to detain individuals found to be enemy combatants. Aug. 16 Order at 11, 13. Respondents, however, offered to provide the court with further information about those criteria in a classified filing that would be submitted ex parte and under seal, but explained that review of those criteria is not necessary to conclude that the petition should be dismissed (for the reasons set forth in the government's return). See Return at 3 n.1. The district court did not ask to see the criteria until its August 16 Order, when it criticized the government for not providing more information about the criteria in the Mobbs Declaration.[11]

[11] Respondents then informed the district court, again, that they would provide the court with the criteria ex parte and under seal, see Resp. Mot. for Certification of Interlocutory Appeal and Stay at 2 n.1, but the court instructed respondents not to do

In any event, as the government stated in its return (at 3 n.1), review of the screening criteria is not necessary to resolve this petition. The return and supporting declaration explain the circumstances underlying the military's determination that Hamdi is an enemy combatant. As the declaration indicates, the screening criteria themselves are used to determine not whether an individual is an enemy combatant vel non, but instead to determine which captured enemy combatants have sufficient intelligence value to justify their transfer into United States custody or continued detention by the United States. See Mobbs Decl. ¶¶ 7-8. That determination takes into account additional considerations that distinguish among captured enemy combatants, but are not necessary to the underlying determination that a detainee is an enemy combatant in the first place.

Unlawful Enemy Combatant. The district court stated that "the declaration never refers to Hamdi as an 'illegal' enemy combatant." Aug. 16 Order at 10. But, as explained in the government's return (at 8-9 n.5), the military's authority to detain Hamdi is not dependent on the fact that he is an unlawful, rather than lawful, enemy combatant. See note 6, supra. As the Supreme Court made clear in Quirin, 317 U.S.

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so unless they were prepared to provide the court with all the materials subject to its August 16 production order. Tr. of Aug. 20 Hrg. at 22-23 (J.A. 461-462). If this Court wishes to review the screening criteria, respondents will file them with the Court ex parte and under seal.

at 30-31, the military may "capture and det[ain]" both types of combatants, though under the laws and customs of war unlawful combatants are also subject "to trial and punishment by military tribunals for acts which render their belligerency unlawful." Id. at 31. The military has not sought to punish Hamdi for violation of the laws or customs of war, and petitioners challenge only his continuing detention. Accordingly, in resolving this habeas action, there is no need for the court to decide whether Hamdi is an unlawful enemy combatant.

In any event, even if this Court determined that it was necessary to the resolution of this habeas action to decide whether Hamdi is an unlawful enemy combatant, there would be no need for the military to provide any additional factual basis to support that conclusion. The Mobbs Declaration states that the military has determined that Hamdi is an enemy combatant based, inter alia, on "his association with the Taliban." Mobbs Decl. ¶ 6. The President, in his capacity as Commander in Chief, has conclusively determined that the Taliban are unlawful combatants and, as such, are not entitled to prisoner-of-war status under the Geneva Convention. United States v. Lindh, 212 F. Supp. 2d 541, 554-555 (E.D. Va. 2002) ("On February 7, 2002, the White House announced the President's decision, as Commander in Chief, that the Taliban militia were unlawful combatants pursuant to GPW and general principles of international law, and, therefore, they were not entitled to POW

status under the Geneva Conventions."); White House Fact Sheet, Status of Detainees at Guantanamo, Office of the Press Secretary, Feb. 7, 2002 (www.whitehouse.gov/news/releases/2002/02/20020207-13).

National Security. The district court stated that the government has failed to explain why Hamdi's continuing detention "serves national security." Aug. 21 Order at 7. The military is not required to present any individualized threat assessment with respect to enemy combatants seized on the battlefield in wartime. In any event, as the government has made clear, Hamdi is to being detained for the reasons that captured combatants have always been detained in war: to prevent him from continuing to aid the enemy while hostilities continue, and to gather intelligence. See Return at 21; Tr. Aug. 13 Hrg. at 23-24. In addition, respondents have submitted in this case the Woolfolk Declaration, which explains, in particular, why the military's detention of Hamdi and other al Qaeda and Taliban detainees is vital to the national security as part of the ongoing war effort to gain intelligence about the enemy.[12]

3. The district court's August 16 Order invites the "special hazards" foreseen by this Court with respect to the "development of facts" in this sensitive area of

[12] Although the Woolfolk Declaration was initially filed in this Court, respondents provided a copy of the declaration to the district court along with respondents' August 2, 2002 letter (J.A. 143-147) to this Court concerning the military's decision to resume intelligence-gathering interviews with respect to Hamdi.

"military decision-making." Hamdi, 296 F.3d at 283. It is difficult to believe that the government would ever be able to resolve all the sorts of questions or nuances raised by the district court. But even attempting to do so would require a court to conduct an extensive and unprecedented evidentiary proceeding to try to recreate the circumstances surrounding Hamdi's capture and detention on a foreign battlefield. That exercise would be made even more difficult in this case by the fact that Hamdi initially surrendered to coalition forces, rather than to United States forces, an event that is not uncommon when United States forces are fighting alongside allies.

Requiring the government even to attempt to address the supposed deficiencies identified by the district court, and to respond to the district court's "suspicio[ns]" (see Aug. 16 Order at 13), would result in a full-blown evidentiary proceeding in which American commanders would be called, if not directly then effectively, "to account in federal courtrooms." Hamdi, 296 F.3d at 284. What is more, it would invite courts to substitute their own judgment for that of the military in the field who have first-hand knowledge of the circumstances surrounding an individual's detention and the conflict at hand. That result, as this Court itself admonished in the prior appeal, "would stand the warmaking powers of Articles I and II on their heads." Ibid.

D. The District Court Failed To Account For The Fact That Petitioners Do Not Challenge The Battlefield Decision To Detain Hamdi

The district court's conclusion that the government's return and supporting declaration are insufficient is untenable in another respect. Although it recognized that petitioners do not challenge the military's decision to detain Hamdi on the battlefield, the court failed to appreciate the significance of that concession. See Aug. 16 Order at 8 ("Petitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge."); Pet. Traverse at 2 (Petitioners' claim does not "implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan."); Tr. of June 25, 2002 Arg. in No. 02-6895, at 33 ("Now, we again are not challenging the battlefield determination, decision to detain individuals in the theater of combat.").

Hamdi's status as an enemy combatant did not change when he was removed from Afghanistan. The military's authority to detain him as an enemy combatant is not in any way dependent on his presence in Afghanistan. Nor does the transfer from Afghanistan require the military to submit any additional basis for or evidence in support of his detention. The long-established authority of the military to detain enemy combatants during a period of hostilities applies to the detention of enemy combatants at home as well as abroad. As Territo and Quirin illustrate, that is true

even if the detainees claim American citizenship. Furthermore, such a regime could have disastrous practical consequences for the military and national security. The military often transfers captured combatants from the zone of combat to other locations, including this country, where soldiers who administer such detention facilities are less likely to come under enemy attack.

Although the transfer of an enemy combatant to the United States might arguably affect the analysis of a purely legal challenge to his detention, it does not in any way affect the validity of the military's factual determination that the individual is an enemy combatant. This Court's prior decision (and the discussion above) makes clear that Hamdi's detention is lawful if he is indeed an enemy combatant, and so the fact that petitioners do not challenge the initial detention in Afghanistan provides another, and independently sufficient, reason to dismiss the petition in this case. Even though Hamdi has been removed from the battlefield where he was captured, he is just as much an enemy combatant here as he was in Afghanistan.

II. THE DISTRICT COURT ERRED IN SUBJECTING THE MILITARY TO ITS UNPRECEDENTED PRODUCTION DEMANDS

The corollary to the district court's conclusion that the government's return and declaration are insufficient is its demand that respondents produce the materials listed in its July 31 Order, together with the screening criteria discussed above. Aug. 16

Order at 2. That order, too, places unprecedented demands on the military to justify its detention of a captured combatant in wartime, stems from the same fundamental errors discussed above, and should be set aside.

The breadth of the court's production order is extraordinary and provides still further confirmation that the district court utterly disregarded the separation-of-powers principles at the heart of this Court's prior decision. As discussed above, the August 16 Order requires respondents to produce, for the court's ex parte, in camera inspection, copies of all statements made by Hamdi and the raw notes taken by soldiers in Afghanistan and elsewhere from interviews with him, including interrogations conducted for intelligence-gathering purposes; the names and addresses of anyone who has interrogated Hamdi; statements made by allied forces concerning Hamdi; a detailed accounting of how the military has handled Hamdi; and the names and addresses of military officials who made certain determinations. See August 16 Order at 2 (J.A. 426); July 31 Order at 1-2 (J.A. 141-142).

Those materials directly implicate sensitive national security matters concerning the conduct of an ongoing war, potential intelligence in the possession of the enemy, and the military's decisionmaking with respect to the conduct of war and the appropriate facilities for detaining captured combatants. Although the district court's July 31 Order states (at 1) that "intelligence matters" may be redacted, the

order qualifies that statement by providing that such redaction is limited to "intelligence matters not within the scope of this inquiry into Hamdi's legal status." (Emphasis added.) The order thus expressly contemplates that intelligence matters related to Hamdi may not be redacted. Moreover, as discussed above, the sorts of questions raised by district court at the August 13 hearing and in its August 16 Order demonstrate that the court has a fundamentally flawed understanding of the proper "scope of this inquiry of Hamdi's legal status."[13]

The production order leaves no doubt that the district court is applying an improper, de novo standard of review to the military's determination that Hamdi is an enemy combatant. Indeed, the court's August 16 Order states that the materials subject to its production order reflect only the "minimum" that the court would need to "evaluate whether Mr. Mobbs is correct in his assertion that Hamdi's classification

[13] The district court believed that respondents' attempt to obtain relief from its production order "impugn[ed] [its] loyalty to this country." Tr. of Aug. 20 Hrg. at 21; see ibid. ("what you're indicating is I would turn this over to some terrorist group. And that is insulting, believe me.") (J.A. 460). Respondents in no way question the loyalty of the district court. But that does not mean that respondents should be required to produce, inter alia, classified documents, including potential intelligence in connection with an ongoing war, that is not necessary to dispose of the habeas petition. Indeed, access to such classified materials is highly restricted on a "need to know" basis within the Executive itself. Cf. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1369 (4th Cir.) ("It is not to slight judges, lawyers or anyone else to suggest that any [disclosure of classified information] carries with it serious risk that highly sensitive information may be compromised.'), cert. denied, 421 U.S. 908 (1975).

as an enemy combatant is justified." Aug. 16 Order at 9, 14 (emphasis added). The court specifically indicated that it might go even further and order Hamdi himself produced for an evidentiary hearing to inquire into the various statements he made to military interrogators, and thus threaten the vital national security interests in intelligence-gathering. See Aug. 16 Order at 13 ("While it may be premature, and eventually unnecessary, for the Court to bring Hamdi before it to inquire about these statements, the Court finds that it must be provided with complete copies of any statements by Hamdi in order to appropriately conduct a judicial review of his classification."). And the court's astonishing demand for the names and addresses of military personnel who have interviewed Hamdi would require the military to expend finite resources to track down the location of soldiers in the field in an active conflict and suggests that the district court may even regard them as potential witnesses.

The production order grossly departs from the constitutional principles recognized by this Court's prior decision and discussed above. In particular, the Court stated that "[a]ny standard of inquiry must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation." Hamdi, 296 F.3d at 283-284. The order also disregards this Court's admonition that "allowing alleged combatants to call American commanders into account in federal courtrooms would stand the warmaking powers of Article I and II

on the heads." Id. at 284. Indeed, the district court's production demands come not at petitioners' urging, but sua sponte. This Court should make clear that the production order oversteps any constitutionally appropriate judicial role.

Finally, the production order suffers serious flaws wholly apart from the fact that it reflects an improper conception of the judicial role in this sensitive context. Even if this Court were to conclude that, notwithstanding the considerations discussed in Part I above, respondents should be required to provide some further materials to support the military's determination that Hamdi is an enemy combatant, the Court should still set aside the district court's production order in its entirety. Instead of subjecting the military to the unprecedented demands placed upon it by the district court's order, the Court should further delineate the showing that the government would be required to make, and remand with instructions that respondents should be afforded an opportunity to meet that showing without being subjected to any particular production demands by the court.[14]

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[14] Although the production order is an intrusion and inappropriate in the aspects discussed above, respondents have already provided or offered to provide much of the material demanded by the court. First, as discussed above, respondents offered to provide the district court with additional information concerning the screening criteria. Second, the Mobbs Declaration establishes a chronology of the Hamdi's detention. Third, the Mobbs Declaration explains that military personnel in Afghanistan, acting under the authority of the Commander, U.S. Central Command, made the determination that Hamdi is an enemy combatant and should be detained as such. The district court's failure to recognize what respondents had already

III. THIS COURT SHOULD REVERSE AND REMAND WITH INSTRUCTIONS TO DISMISS THE PETITION

By holding that respondents' return and supporting declaration are insufficient and ordering the production of the additional materials, the district court's August 16 Order necessarily rejected respondent's motion to dismiss. This Court should reverse that erroneous order and remand with instructions to dismiss the petition. Because the government has adequately shown that Hamdi is "indeed an 'enemy combatant' who was captured during hostilities in Afghanistan," Hamdi, 296 F.3d at 283, no further district court proceedings are necessary to dispose of the petition. Furthermore, as the proceedings on remand from the prior appeal underscore, sending the case back to the district court for additional proceedings in all likelihood would invite the need for further appellate supervision of this action.

None of the purely legal arguments raised below by petitioners or the district court below in resisting dismissal precludes this Court from ordering dismissal at this time. Petitioners below contended that Hamdi's detention is illegal because "the armed conflict with the Taliban has ended." Traverse at 15 n.7; see id. at 6. But that argument is utterly without merit. While the Taliban regime has been removed from power, the hostilities in Afghanistan are ongoing. Indeed, thousands of United States

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provided or offered to provide underscores how far its review of the government's return and declaration went awry.

and coalition forces remain in Afghanistan and engage in daily combat operations, particularly in eastern Afghanistan where many remaining al Qaeda and Taliban have fled. See, e.g., M. Kelley, New Mission Launched in Afghanistan, Associated Press, Oct. 2, 2002 (www.story.news.yahoo.com/news? tmpl=story&u=/ap/20021002/ap_on_re_us/afghan_us_military_4) ("In the largest ground operation in Afghanistan in six months, up to 2,000 U.S. Army troops are searching the mountains of southeastern Afghanistan for Taliban and al-Qaida holdouts."); M. Rosenberg, Shots Fired at U.S. Special Operations Forces in Southeastern Afghanistan, Associated Press, Oct. 1, 2002, (www.story.news.yahoo.com/news?tmpl=story&u=/ap/20021001/ap_wo_en_po/afghan_us_shooting_3); J. Garamone, U.S. Personnel Comes Under Fire In Afghanistan, American Forces Press Service, Sept. 20, 2002 (www.af.mil /news/efreedom). Moreover, the conflict in Afghanistan is part of a broader military campaign that, as the Commander in Chief has emphasized, is far from complete.[15]

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[15] See, e.g., Remarks to the Nation, Office of the Press Secretary, Sept. 11, 2002 ("America has entered a great struggle that tests our strength, and even more our resolve.") (www.whitehouse.gov/news/releases/2002/09/print/20020911-3.html); President Salutes Troops of the 10th Mountain Division, Office of the Press Secretary, July 19, 2002 (www.whitehouse.gov/news/releases/2002/07/20020719.html) ("In Afghanistan, coalition troops still have critical work. And the dangers haven't passed. Elsewhere, new threats are taking shape."). The Supreme Court has expressly recognized that questions concerning the cessation of hostilities or the scope of armed conflict are committed to the political branches. See, e.g., Ludecke v. Watkins, 335 U.S. at 170.

Petitioners have asserted that 18 U.S.C. 4001(a) bars Hamdi's detention as an enemy combatant.[16] Although the petition itself makes no mention of Section 4001(a), petitioners raised it before this Court and relied on it at oral argument in the prior appeal. This Court specifically inquired about Section 4001(a)'s application to this case during the argument, see Tr. of June 25, 2002 Arg. at 18-19, and nonetheless correctly concluded that Hamdi's "present detention" is "lawful" as long as he is indeed an enemy combatant. Hamdi, 296 F.3d at 283.

Nothing in Section 4001 suggests, much less clearly states, that Congress sought to intrude upon the "long * * * established" authority of the Executive to capture and detain enemy combatants in wartime. Hamdi, 296 F.3d at 283; see id. at

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[16] That provision – entitled "Limitation on detention; control of prisons" – states:

> (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
>
> (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations.
>
> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates, and provide for their * * * rehabilitation, and reformation.

18 U.S.C. 4001.

281-282 ("The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2."). To the contrary, Congress placed Section 4001 in Title 18 of the United States Code – which governs "Crimes and Criminal Procedure" – and addressed it to the control of civilian prisons and related detentions. Subsection (b) addresses "control and management of Federal penal and correctional institutions," and exempts from its coverage "military or naval institutions." 18 U.S.C. 4001(b). Subsection (a), the provision relied upon by petitioners, cannot be read without reference to the immediately surrounding text. See Owasso Indep. Sch. Dist. v. Falvo, 122 S. Ct. 934, 939-940 (2002). And, particularly when read as a whole, there is no basis for concluding that Section 4001 was in any way addressed to the military's detention of enemy combatants.

Moreover, even if Section 4001 were susceptible to a different interpretation, the longstanding canon of constitutional avoidance would independently foreclose any interpretation of Section 4001(a) that would extend it to interfere with the well-established authority of the President as Commander in Chief of the armed forces to detain enemy combatants during wartime. See Jones v. United States, 529 U.S. 848, 857 (2000); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). Petitioners' proposed reading of Section 4001(a) would directly interfere with the President's ability to detain an enemy combatant

who claims citizenship. A Court should not infer that a provision that is explicitly addressed to civilian detentions was intended to override that long-established and vital wartime authority of the Executive.[17]

Finally, after respondents filed their return, petitioners for the first time asserted that Hamdi's detention violated joint service regulations (J.A. 91-128) setting forth the military's procedures for handling prisoners of war. See Traverse at 7-9 (citing Joint Service Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997)). Specifically, petitioners contended that respondents have failed to convene a military tribunal to resolve any doubts about whether Hamdi is covered by the protections of the Third Geneva Convention applicable to prisoners of war, and have failed to house Hamdi in the

[17] In any event, the detention at issue is authorized by at least two different Acts of Congress. First, as this Court specifically noted, the challenged executive actions in this case fall within Congress's express statutory authorization to the President "to use force against those 'nations, organizations, or persons he determines' were responsible for the September 11 terrorist attacks." Hamdi, 296 F.3d at 283 (quoting 115 Stat. 224; emphasis added by court of appeals). Second, Congress has authorized the use of appropriated funds to the Department of Defense to pay for the expenses incurred in connection with "the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war." 10 U.S.C. 956(5); see 10 U.S.C. 956(4) (authorizing use of appropriated funding for "issue of authorized articles to prisoners and other persons in military custody"). By explicitly authorizing funding to the armed forces to pay for the detention of "prisoners of war" and persons – such as enemy combatants – "similar to prisoners of war" Congress has plainly authorized the military detention of such combatants.

kind of correctional facility required for prisoners of war under the regulations. Ibid.

The provisions of the regulations in question, however, apply only to persons who enjoy prisoner-of-war status under the Geneva Convention (and those for whom there is doubt as to whether they qualify as prisoners of war). See Reg. 1-5(a)(2) (providing that "[a]ll persons taken into custody by the U.S. forces will be provided the protections" afforded prisoners of war under the Geneva Convention "until some other status is determined by competent authority") (emphasis added); id. at 1-6(a) (stating that "if any doubt arises as to whether a [detainee qualifies for prisoner-of-war status] * * *, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."). The President, however, has conclusively determined that al Qaeda and Taliban detainees, such as Hamdi, do not qualify for such prisoner-of-war status. See p. 41, supra.[18]

* * * * *

This is the third appeal that this Court has heard in just five months involving the detainee in this case. The record is now complete and fully supports dismissal of

[18] Even if Hamdi's detention were somehow inconsistent with the joint service regulations, that would not entitle Hamdi to relief in this habeas action, much less his release. That is particularly true, moreover, given that those regulations, if applicable, would primarily relate to the conditions of Hamdi's confinement, and petitioners have made clear that "Petitioner Hamdi is not contesting the conditions of his confinement." Pet. Traverse at 9; cf. Preiser v. Rodriguez, 411 U.S. 475, 489-490 (1973).

the petition outright, and any remaining legal challenges to Hamdi's detention are fully capable of resolution by this Court in the present appeal. The extraordinary actions taken by the district court to date also support entry of such relief, as an alternative to the prospect of continuing appellate supervision of the district court proceedings. So too, the backdrop against which this action arises – an international conflict in which thousands of innocent Americans have been brutally killed at home and numerous American and allied soldiers have been killed or suffered casualties in the field – counsels in favor of disposing of this action as swiftly as possible, and eliminating any doubt about the military's authority to detain the enemy combatant at issue. Accordingly, the Court not only should reverse the district court's August 16 Order, but remand with instructions that the petition be dismissed outright.

CONCLUSION

For the foregoing reasons, the district court's August 16 Order should be reversed and the case remanded with instructions to dismiss.

Respectfully submitted,

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OCTOBER 2002

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Respondents-Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 13,903 words. This count was undertaken by the word-processing system used to prepare the brief.

Gregory G. Garre
Assistant to the Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief for Respondents-Appellants was served, this 4th day of October, 2002, by facsimile and overnight delivery addressed to:

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Attachment C

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

November 25, 2002

The Honorable Joseph R. Biden, Jr.
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

Thank you for your letter of May 16, 2002, to the Attorney General regarding S. 2513, the "DNA Sexual Assault Justice Act of 2002." The bill includes proposals which aim to promote the effective operation and long-term viability of the Department of Justice's DNA analysis backlog elimination programs; to ensure adequate training of medical personnel, law enforcement personnel, and prosecutors in obtaining, handling, and using DNA evidence; to ensure that statutes of limitations do not bar the prosecution of perpetrators identified through DNA testing; and to strengthen the administration of the DNA identification system at the national level.

We strongly support these objectives, which are fully shared by the Attorney General. We commend the leadership you have shown on these important issues, and look forward to working with you in developing the most effective means of realizing them.

In brief, our views concerning the measures proposed in the bill are as follows:

Sections 2-6, Strengthening the DNA Analysis Backlog Elimination Program

The provisions in these sections aim to promote the effective operation and long-term viability of the Department's backlog elimination program. The most significant specific change S. 2513 proposes in the program is allowing direct grants to units of local government, as opposed to channeling all backlog reduction funding through the State governments. We fully endorse this change. The current system, in which local governments can participate only through their States, has prevented several jurisdictions from receiving funds. In a number of cases, these jurisdictions have backlogs larger than those of many States.

While we support the objectives of these sections, we would note that a few specific amendments they include are unnecessary or could have unintended negative effects. We would recommend that these amendments not be included, for reasons discussed in our detailed comments below.

Sections 7-9, Effective Collection and Handling of DNA Evidence

We encourage State and local efforts to improve training of medical and law enforcement personnel in collecting and handling DNA evidence. However, the new programs authorized by Sections 8 and 9 are not in the Department's FY 2003 budget request.

Section 10, Addressing Statute of Limitations Problems in the DNA Identification System

We strongly support the objective of this section, which is to ensure that sexually violent criminals whose guilt can be established through DNA testing will not escape justice through the operation of statute-of-limitations rules. The realization of this objective should be ensured by eliminating the statute of limitations for prosecution in felony sex offense cases, as proposed for example in H.R. 5422 § 202, and by enacting a general provision to toll statutes of limitations in felony cases where the perpetrator is identified through DNA matching. See Statement of Sarah V. Hart, Director, National Institute of Justice before the Senate Judiciary Subcommittee on Crime and Drugs regarding DNA Initiatives, at 7-8 (May 14, 2002) (noting need for statute of limitations reform to fully realize the value of the DNA technology).

While the use of DNA profile ("John Doe") indictments can be useful in some cases, it can only provide an incomplete, stopgap response to the statute of limitations problem, and would leave many demonstrably guilty rapists immune from prosecution. For the reasons explained in our detailed comments below, the particular provisions proposed on this point in section 10 of S. 2513 would not represent an advance over current law, and would have unintended restrictive effects in comparison with current law.

Sections 11-13, Administration of the DNA Identification System at the National Level

The matters addressed in these sections include the continuing operation and expansion of the Federal Convicted Offender Program ("FCOP"), and upgrading the Combined DNA Index System ("CODIS"). We of course support these objectives, which are reflected in our current operations, as discussed below.

The efficacy of CODIS and FCOP depends critically on the number of DNA profiles they include. If DNA is collected from a broader range of offenders, more crimes will be solved. We accordingly recommend that this legislation include the expansion of DNA sample collection by the Federal government to include all Federal offenders who have been convicted of felonies. This reform appears in such pending legislation as S. 2917 § 4, and the Senate as a whole has already endorsed authorizing the collection of DNA samples from all Federal felons, through provisions sponsored by Senators Kohl and DeWine that the Senate passed in 1999. See S. 254 § 1503(b)(3), 106th Cong., 1st Sess. (1999) (proposed 42 U.S.C. § 14132(d)(2)(B)(iii)). The trend in State law reform is strongly in this direction, and twenty-three States have enacted legislation authorizing "all felons" DNA sample collection. The need for this reform has been noted in testimony by the Department before your Subcommittee. See Statement of Sarah V.

Hart, Director, National Institute of Justice before the Senate Judiciary Subcommittee on Crime and Drugs regarding DNA Initiatives, at 6 (May 14, 2002).

In addition, the statute governing CODIS should be amended to allow States to include DNA information on all persons from whom DNA sample collection is authorized under the States' laws, rather than being limited to convicted offenders, as the current statute provides. See 42 U.S.C. § 14132(a)(1). Most States now collect DNA samples from some categories of adjudicated juvenile delinquents, and some States have authorized DNA sample collection from certain arrestees. The States can collect these samples and include the resulting DNA profiles in their own DNA databases, but cannot enter this information into the national DNA index because of the wording of the Federal database statute. This undermines the utility of CODIS as a means of making nationally available for law enforcement identification purposes the information collected under the State systems, and hence works against the effective solution of sexual assaults and other crimes through DNA matching. I would note that the Senate has already endorsed allowing the inclusion in the national index of DNA information on adjudicated juvenile delinquents, in the Kohl-DeWine legislation that it passed in 1999. See S. 254 § 1503(b)(1), 106th Cong., 1st Sess. (1999). The need for this reform has also been noted in the Department's testimony before your subcommittee. See Statement of Sarah V. Hart, Director, National Institute of Justice before the Senate Judiciary Subcommittee on Crime and Drugs regarding DNA Initiatives, at 6-7 (May 14, 2002).

Finally, the States should be encouraged and assisted in expanding their own DNA databases. In many States, the DNA database is far more limited than it should be because State law does not consistently require offenders convicted before the date of enactment of the DNA sample collection statute to provide such a sample, even though they remain in the system in custody or under supervision. Hence, dangerous offenders are released or leave the system without any way to ascertain if they have committed other crimes in the past or to match them with crime scene evidence collected in the future. Moreover, while the strong trend in State law reform is to authorize collection of DNA samples from all felons, rather than more narrowly defined categories of offenders, about half of the States have not yet done so. The remaining States should be encouraged to adopt this important reform.

Before turning to our more detailed comments, we would like to review briefly the Department's ongoing activities relating to DNA identification. These have been very much in line with the objectives of your proposals, as set forth in S. 2513, and specifically overlap with them in a number of areas.

Department of Justice's Ongoing Activities

Early in his tenure, Attorney General Ashcroft designated as a major priority for the Department the alleviation of the backlog of crime scene and offender DNA samples, and the expansion of DNA technology capabilities in the nation's criminal justice systems. In furtherance of these goals, the Attorney General directed that a review be conducted to determine

the actual extent of the problem and to recommend improvements. Following this assessment, in August 2001, the Attorney General announced a major initiative to improve and expand DNA capabilities. This initial effort included:

(1) providing more than $30 million to the States for reducing DNA backlogs – including both the analysis of convicted offender DNA samples and the analysis of crime scene DNA samples in cases involving no known suspects, such as rape kit DNA samples;

(2) a directive to the FBI to make improvements to CODIS to increase its data storage and search capacities and allow participating forensic laboratories immediate electronic access to the system for the purpose of solving crimes;

(3) a directive to the National Institute of Justice (NIJ) to assess and make recommendations about ways to reduce delays in the analysis of crime scene DNA evidence, which today typically range from six months to a year;

(4) expansion of the CODIS database through the inclusion of approximately 20,000 to 30,000 Federal, District of Columbia, and military offenders; and

(5) the transfer of $25 million from the Department's asset forfeiture fund to NIJ for DNA backlog reduction.

More recently, in March of 2002, the Attorney General determined to expand and carry further our DNA efforts through a second initiative. This initiative included:

(1) an announcement of the results of a Department of Justice pilot program to test crime scene DNA evidence in no-suspect cases, which has led to more than 1000 matches of evidence to DNA profiles in national, State, and local DNA databases;

(2) an announcement of a total commitment to more than $100 million for DNA analysis backlog reduction (encompassing funds presently available and funds in the President's FY 2003 budget request), including $60 million for the "no-suspect" program;

(3) a directive to the FBI to implement its CODIS improvement plan developed at the Attorney General's direction, which will increase the system's capacity from 1.5 million DNA profiles to 50 million DNA profiles, reduce the search time from hours to microseconds for matching DNA profiles, and enable instant, real-time (as opposed to weekly) searches of the database by participating forensic laboratories; and

(4) a directive to Department components to target future DNA grant-making to solve the largest number of crimes, and particularly the most serious offenses, and to work with State and local law enforcement to ensure the successful implementation of DNA technology.

This wide-ranging program has already yielded major benefits in terms of enhanced law enforcement and improved public safety through the solution of numerous rapes, murders, and other serious crimes. Moreover, what has been accomplished until now is only a harbinger of what can be accomplished in the future, with your help and leadership and that of other members of Congress.

With this much background, our more specific comments on the provisions in the bill are as follows:

I. SECTIONS 3-6, STRENGTHENING THE DNA ANALYSIS BACKLOG ELIMINATION PROGRAM

We strongly support the objective of carrying forward and strengthening the backlog reduction program which is addressed in these sections, and specifically endorse the proposal to include local governments among the authorized grantees, which appears in section 5 of the bill. As noted, we have concerns about a few provisions in these sections, which we would recommend be reconsidered or not included.

Section 2 would direct the Attorney General, acting through the Director of the National Institute of Justice ("NIJ"), to survey law enforcement jurisdictions to assess the amount of DNA evidence contained in rape kits and other sexual assault crime scene evidence which has not been subjected to testing and analysis. Presumably the objective of this section is to assess the dimensions of the problem so that effective planning is possible to eliminate the backlog. We certainly share this objective. However, NIJ has already commissioned a contractor to do an assessment of DNA backlog issues. This assessment is being carried out as part of NIJ's response to the Attorney General's directive of August 21, 2001, requesting that NIJ conduct a comprehensive assessment of the delays that exist in completing DNA analysis of crime scene evidence. In light of this existing study, section 2 of the bill is unnecessary, and we recommend that it not be included.

Section 3 of the bill proposes to include a specification in 42 U.S.C. § 14135(a)(2) that "samples from crime scenes" to which backlog reduction funding may be applied include "samples from rape kits and samples from other sexual assault evidence, including samples taken in cases with no identified suspect." This is unnecessary because the reference in the statute to crime scene samples is already understood to include rape kit and sexual assault evidence, and in fact the analysis of such evidence is a principal focus of the program. Moreover, the proposed reference to samples in no-suspect cases serves no purpose and is potentially confusing. The statute already specifies that funds provided for the purposes described in § 14135(a)(2)-(3) shall be used "to conduct or facilitate DNA analyses of those samples that relate to crimes in connection with which there are no suspects," and earmarks the lion's share of the authorized funding for those purposes. *See* 42 U.S.C. § 14135(c), (j)(2).

Section 4 of the bill authorizes grants for the analysis of DNA samples at a level more than double the Department's FY 2003 budget request.

We also have concerns regarding section 6(2) of the bill, which provides that the Attorney General "shall give priority to a State or unit of local government that has a significant rape kit or nonsuspect case backlog per capita as compared with other applicants." Beyond uncertainty about what degree of disparity should be considered "significant," this standard would effectively require comparing each jurisdiction's backlog problems in the specified areas to those of all other jurisdictions that seek grants, if available grant funds are not adequate to fully fund all applications. This would potentially create an incentive for applicants to seek to qualify for the priority by producing figures as high as possible in these areas, and different jurisdictions could respond differently in terms of how they characterize their cases for these purposes. To the extent that the existence of significant backlogs in a particular jurisdiction may result from a lack of diligence in addressing the problem, one might question according it priority in comparison with other jurisdictions that have been willing to do more. Moreover, aside from rape cases, murder cases are those most frequently targeted by State and local jurisdictions for the aggressive use of the DNA technology. Without questioning the absolutely critical need to address and eliminate the backlog of unanalyzed rape kits, a jurisdiction with a sexual assault evidence backlog should not be presumptively prioritized over a jurisdiction with, *e.g.*, a murder evidence backlog. In requiring a priority for "grants under this section," the proposed new provision also does not differentiate between grants relating to the backlog of convicted offender samples (42 U.S.C. § 14135(a)(1)) and grants relating to the backlog of crime scene samples in no-suspect cases (42 U.S.C. § 14135(a)(2)-(3)), but the existence of rape kit and no-suspect case backlogs has no direct bearing on a jurisdiction's need for a grant to help clear its backlog of convicted offender samples. For the foregoing reasons, we recommend not including this provision in the bill.

II. Sections 7-9, Effective Collection and Handling of DNA Evidence

Regarding section 7 of the bill, while we agree that the development of standards for DNA collection and handling is beneficial, we are concerned about the directive to the Attorney General to develop a specific national protocol for the collection of DNA evidence at crime scenes. Conducting a review of all national, State, local, and tribal government DNA protocols that are currently in place, as the bill seems to require as a predicate for standards development, would be burdensome and of questionable value in comparison with its costs. By adopting specific government-sponsored standards, legal challenges by defendants may be invited based on inconsequential departures from the standards, which could disrupt cases in which there is no legitimate objection to the validity of the DNA evidence. Moreover, the objective of ensuring sound methodology in DNA evidence collection and handling does not require the promulgation of a recommended nationally applicable protocol by the Attorney General. The Department has been working in recent years with local jurisdictions to improve, through training and assistance, the handling processes and procedures involved in DNA cases. The forensic community has established standards through the American Society of Crime Laboratory Directors for DNA

evidence handling and analysis. In light of the foregoing, we would recommend that this section not be included in the bill.

We encourage States to promote effective evidence collection and maximize the use of DNA evidence in rape cases while ensuring respect for victims' rights and privacy, such as SANE (Sexual Assault Nurse Examiner) and SART (Sexual Assault Response Team) programs. State and local agencies should also improve training for all personnel who provide the critical intake of DNA evidence, and use it in the investigation and prosecution of crimes, including law enforcement officers, other first-responders, prosecutors, and medical personnel. We would note, for example, that Great Britain has made substantial use of forensic evidence because law enforcement officers responding to crime scenes have been trained in evidence collection (primarily DNA and fingerprints). Studies in Great Britain have demonstrated that specialized evidence collection teams obtain usable DNA evidence almost twice as often as those without specialized training. However, the new training grant programs authorized under Sections 8 and 9 are not in the Department's FY 2003 budget request.

III. Section 10, Addressing Statute of Limitations Problems in the DNA Identification System

We strongly support addressing the problem that statute-of-limitations rules now pose to the effective use of the DNA technology to bring sexually violent criminals to justice. However, this problem cannot be satisfactorily resolved through the use of DNA profile ("John Doe") indictments.

In general, effecting a reasonably certain identification of the perpetrator of a rape by DNA profile requires carrying out analyses of the rape kit material and other material in order to derive DNA, generate a profile, and confirm that the DNA is not the DNA of the victim and does not derive from a consensual sexual partner of the victim. After the necessary analyses are carried out, an indictment would need to be filed within the applicable limitation period for prosecution which, as discussed below, is usually five years after the offense in Federal cases.

The use of John Doe indictments accordingly does not eliminate the need for law enforcement and forensic personnel to race the clock in order to identify and analyze retained evidence in unsolved sexual assault cases and file indictments within whatever time is allowed by the statute of limitations. Nor can it help in the existing cases in which the limitation period for prosecution has already expired, but future DNA analysis and matching will hereafter establish the identity of the perpetrator.

The State DNA systems have been solving old cases through DNA testing at an ever-increasing rate, as the DNA databases have grown and the use of the DNA technology has expanded. Eventually, there may be thousands of rapists whose identity is conclusively established through DNA matching, but for whom the identification does not come until after the

expiration of an existing limitation period. There will be no possibility of bringing these sexually violent criminals to justice in the absence of real statute of limitations reform.

The problem, however, can be solved through simple changes in the statutes of limitations, such as that proposed in H.R. 5422 § 202. I will describe briefly the nature of the statute of limitations problem under current Federal law, and the means of resolving it through reforms like that proposed in H.R. 5422. I will then return to the provisions in section 10 of the bill, and discuss specific concerns we have about them, beyond the intrinsic limitations of the "John Doe" indictment approach.

A. Federal Statutes of Limitations

The limitation period for prosecuting most Federal offenses is five years. See 18 U.S.C. § 3282. While there are some exceptions to this limitation – see, e.g., 18 U.S.C. § 3281 (no limitation period for capital crimes); 18 U.S.C. § 3293 (ten-year limitation period for certain financial institution offenses); 18 U.S.C. § 3294 (twenty-year limitation period for certain thefts of artwork) – no comparable exception exists for sexually violent crimes. We observed in testimony before your Subcommittee:

> [Fully] realizing the value of the DNA technology requires complementary changes in the limitation rules for prosecution. Collecting DNA samples from convicted offenders and matching them to crime scene evidence proves to be futile where, for example, the convicted offender sample matches a rape committed some years previously, but prosecution is impossible because it is time-barred. For example, the limitation rule for most offenses in federal law is five years, see 18 U.S.C. 3282, so a rapist who is not identified within five years has quite likely beaten the rap forever.

Statement of Sarah V. Hart, Director, National Institute of Justice before the Senate Judiciary Subcommittee on Crime and Drugs regarding DNA Initiatives, at 7 (May 14, 2002).

There is recent precedent for congressional action to address the excessive restrictiveness of the existing limitation rules. Specifically, § 809 of the USA PATRIOT ACT (P.L. 107-56) enacted 18 U.S.C. § 3286(b), which eliminated the limitation period for prosecution of many terrorism offenses. At the State level, the rules governing the initiation of criminal prosecutions are often more permissive than those currently applicable in Federal cases. A number of States have no limitation period for the prosecution of felonies generally, or for other broadly defined classes of serious crimes. See, e.g., Ala. Code § 15-3-5 (no limitation period for prosecution of felonies involving violence, drug trafficking, or other specified conduct); Ky. Rev. Stat. § 500.050 (generally no limitation period for prosecution of felonies); Md. Cts. & Jud. Proc. Code § 5-106 (same); N.C. Gen. Stat. § 15-1 (same); Va. Code § 19.2-8 (same); see also Ariz. Rev. Stat. § 13-107(E) (limitation period for prosecution of serious offenses tolled during any time when identity of perpetrator is unknown). Other States have amended their statutes of limitations in light of the development of the DNA technology and its ability to make conclusive

identifications of offenders even after long lapses of time. Common reforms include extending or eliminating the limitation period for prosecution in sexual assault cases or cases that may be solvable through DNA testing. See, e.g., Ark. Code § 5-1-109(b)(1); Del. Code tit. 11 § 205(i); Ga. Code § 17-3-1(b), (c.1); Idaho Code § 19-401; Ind. Code § 35-41-4-2(b); Kan. Stat. § 21-3106(7); La. Crim. Proc. Code art. 571; Mich. Comp. Laws § 767.24(2)(b); Minn. Stat. § 628.26(m); Or. Rev. Stat. § 131.125(8); Tex. Crim. Proc. Code art. 12.01(1)(B).

As noted above, legislation has already been introduced which would resolve the statute of limitations problem in Federal sex offense cases. H.R. 5422 § 202 proposes a new § 3296 in the statute of limitations chapter of the criminal code, which would provide straightforwardly that indictments and informations charging felony sex offenses – i.e., felony offenses under chapters 109A, 110, and 117, and section 1591 of title 18 – may be filed without limitation of time. The section also reasonably applies the same no-limitation rule to non-parental child abductions, i.e., offenses against minors in violation of 18 U.S.C. § 1201, since abductions of children by strangers are likely to be for purposes of sexual abuse. Cf. 18 U.S.C. § 4042(c)(4)(A) (kidnapping of minors included in sex offender release notice and registration provisions of Federal law).

We recommend that this important reform be included in S. 2513 in lieu of the provisions now appearing in section 10. We also recommend that a general tolling provision be added to the statute of limitations chapter, for cases in which the defendant is implicated in the offense through DNA testing. Specifically, such a provision should provide that any applicable limitation period does not start to run until the DNA testing which implicates the defendant takes place. A reform of this type is necessary, in addition to the reform for sex offenses proposed in H.R. 5422, because the DNA technology is also a critical tool in solving other types of serious crimes, including murders.

For example, consider a case in which a man travels interstate to hunt down his estranged wife, and kills her, in violation of 18 U.S.C. § 2261, the "interstate domestic violence" offense enacted by the Violence Against Women Act. Since 18 U.S.C. § 2261 contains no death penalty authorization, even for cases in which the victim is murdered, the no-limitation rule of 18 U.S.C. § 3281 for capital offenses would be inapplicable. Thus, a prosecution of the killer under 18 U.S.C. § 2261 would normally be time-barred five years after the offense, and he would be immune from prosecution under this statute, even if he were conclusively identified as the perpetrator through DNA matching to crime scene evidence one day after the expiration of the five-year period. This type of result could, and should, be avoided through the adoption of a provision which specifies that any applicable limitation period in such a case runs from the time when the DNA testing that implicates the offender occurs, rather than from the time of the crime.

Importantly, these statute of limitations reforms must be given fully retroactive effect to old cases, since otherwise rapists and other criminals identified in many of these cases will continue to be shielded from prosecution, notwithstanding their conclusive identification as the

perpetrators through DNA matching. The USA PATRIOT ACT gave fully retroactive effect to its elimination of limitation periods for the prosecution of terrorism cases, see P.L. 107-56 § 809(b) (providing that statute of limitations reform "shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this section"). H.R. 5422 § 202(c), through identical language, gives fully retroactive effect to the corresponding reform it proposes for sex offense cases.

The retroactive application of this type of reform is constitutional because the Constitution's prohibition of ex post facto laws only bars (1) criminalizing conduct that was non-criminal when it occurred; (2) aggravating a crime after its commission; (3) increasing the penalty for a crime after its commission; or (4) retroactively reducing the nature or quantum of evidence sufficient for conviction of a crime. *See Carmell v. Texas*, 529 U.S. 513 (2000); *Collins v. Youngblood*, 497 U.S. 37 (1990). Since legislative changes that affect the limitation period for prosecution do none of these things, they are not constitutionally proscribed ex post facto measures. *See Carmell*, 529 U.S. at 539 ("mistake to stray beyond" the identified historic categories of types of impermissible ex post facto laws); *United States v. Grimes*, 142 F.3d 1342, 1350-51 (11th Cir. 1998) (noting uniform holdings of the Federal courts of appeals that retroactive legislative changes of limitation periods are constitutional as applied to prosecutions in cases where the previous limitation period had not yet expired), *cert. denied*, 525 U.S. 1088 (1999); *People v. Frazer*, 982 P.2d 180, 190-98 (Cal. 1999) (holding that retroactive legislative extension of limitation period is not an impermissible ex post facto law even as applied to a case in which the previous limitation period already had expired), *cert. denied*, 529 U.S. 1108 (2000). Moreover, the Due Process Clause does not incorporate any principle of justice or repose that generally entitles the perpetrator of a rape, murder, or other crime to permanent immunity from prosecution merely because he has succeeded in avoiding identification and apprehension for some period of time, or because of a procedural rule limiting the time to commence prosecution which has been superseded by later legislation. *See, e.g., Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314-16 (1945) (due process does not forbid legislative changes in statutes of limitations that revive time-barred actions); *Frazer*, 982 P.2d at 198-205 (extending the same due process analysis to criminal statutes of limitations).

B. Section 10 of S. 2513

Beyond the inherent limitations of "John Doe" indictments in addressing the existing problems in DNA cases, we have a number of serious concerns about the specific provisions in section 10 of the bill.

The "John Doe" indictments that section 10 would authorize in cases under chapter 109A of the criminal code are already permitted under Federal law. Under Rule 7 of the Federal Rules of Criminal Procedure, the defendant's name is not necessary for the indictment to be valid. Generally, as long as the defendant can be properly identified by the description provided in the indictment, it is valid even without his name. *See, e.g., United States v. Fawcett*, 115 F. 2d 764, 767 (3d Cir. 1940) (an indictment is an accusation against a person, not against a name, and

hence the name is not of the substance of an indictment); *U.S. ex rel Mouquin v. Hecht*, 22 F.2d 264 (2d Cir. 1927) (intention of grand jury as to person indicted is ascertained from words used, considered in light of attending circumstances). Prosecutors have identified defendants in indictments in alternative ways and courts have found these descriptions to be sufficient. *See, e.g., United States v. Doe*, 401 F. Supp. 63 (E.D. Wis. 1975) (description in indictment which was directed against "John Doe," which included alias "Leo," and which enumerated various other particulars concerning the race, sex, age, height, weight, hair color, eye color, and peculiar facial characteristics of the defendant, was sufficient to identify defendant and did not constitute delegation of duty of grand jurors); *United States v. May*, 622 F.2d 1000, 1008 (9th Cir. 1980) (defendant may be prosecuted under fictitious name he provided).

Moreover, the Department has long taken the position that an indictment without the defendant's name is valid so long as it provides sufficient identifying information – which includes descriptions, aliases, fingerprints, photographs, or DNA identifiers. In authorizing only indictments based on DNA profiles, section 10 of the bill would provide defendants with an argument, by negative implication, that a DNA profile is the only permitted alternative method of identification. Thus, the section could be misconstrued to bar the use of fingerprint identification or other (non-name) identifiers in an indictment. In terrorism and (non-rape) violent crime cases in particular, it is more likely that evidence of the latter sort would be available to the government.

A further concern is that section 10 authorizes use of a DNA-based indictment only for offenses under chapter 109A of the criminal code. This excludes rapes and sexual assaults prosecuted under other chapters of the code, such as chapter 117, and all non-sexually assaultive crimes in which this form of indictment would otherwise be allowed, such as murder cases in which DNA evidence is recovered from the crime scene. Hence, this overly narrow authorization would likely deprive the government of a legitimate option in indicting cases under other chapters of the code which would be allowed under current law.

The formulation of section 10 also has unnecessary and confusing features. The limitation rules in chapter 213 of the criminal code, such as 18 U.S.C. § 3282, set limits on the period of time within which an indictment or information must be filed. Once an indictment or information is filed within the applicable limitation period, there is no longer any issue of the prosecution being potentially barred by § 3282 or other provisions of the chapter. Hence, it makes no sense to say, as in proposed 18 U.S.C. § 3282(b)(2)(A) in section 10, that a DNA profile indictment filed within five years of the offense is not subject to the five-year limitation period of 18 U.S.C. § 3282. An indictment filed within five years of the offense – regardless of whether the defendant is identified by name, by DNA profile, or by other means – is consistent with the five-year limitation rule of § 3282, and nothing more needs to be said to allow the prosecution to proceed in such a case. Likewise, there is no point in the provision of proposed § 3282(b)(2)(B) which says that the Speedy Trial Act (chapter 208) provisions do not apply in relation to a timely DNA profile indictment until the individual is arrested or served with a

summons on the charges, because chapter 208 does not limit the time for indictment until the defendant is arrested or served with a summons. See 18 U.S.C. § 3161(b).

SECTIONS 11-13, ADMINISTRATION OF THE DNA IDENTIFICATION SYSTEM AT THE NATIONAL LEVEL

We support the continued development of the Federal Convicted Offender (DNA) Program and the improvement of the CODIS system. The authorization of $500,000 for the Federal Convicted Offender Program for FY 2003 in section 12 of the bill reflects the non-personnel costs associated with this program. Five additional staff members are needed to operate this program. Including the cost of these individuals would bring the total amount to $867,000 for FY 2003. Regarding CODIS, the FBI is implementing a major redesign of the system as directed by the Attorney General. That redesign is in progress, as noted in the Department's testimony before your Subcommittee. See Statement of Dr. Dwight E. Adams, Assistant Director of the Laboratory Division of the Federal Bureau of Investigation (May 14, 2002).

Section 13 of the bill directs the Attorney General to issue regulations limiting access to or use of stored DNA samples or DNA analyses. However, the DNA identification system is already subject to strict statutory privacy rules – which generally preclude the use of DNA samples and analyses for purposes other than law enforcement identification – and is also already subject to quality control standards required by statute. See 42 U.S.C. §§ 14131, 14132(b), 42 U.S.C. § 14133(a)-(b). Violation of these rules and standards would result in ineligibility to participate in CODIS, ineligibility for Federal DNA backlog reduction funding, and other sanctions. See 42 U.S.C. §§ 14132(c), 14133(c), 14135(b)(2), 14135e. We can identify no problem which calls for the further regulatory action that section 10 would require, and accordingly recommend that it not be included in the bill.

Thank you for the opportunity to present our views. We again commend the leadership and hard work you have brought to this important area, which presents historic opportunities to advance the cause of justice, and we look forward to working with you to meet our common objective of using the DNA technology as effectively and fully as possible to solve crimes. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary

The Honorable Orrin G. Hatch
Ranking Minority Member
Committee on the Judiciary

The Honorable Charles E. Grassley
Ranking Minority Member
Subcommittee on Crime and Drugs
Committee on the Judiciary

Attachment D

Federal Bureau of Investigation
Redirection of 480 Field Special Agent Positions/FTE

November 2002

	Criminal Investigative Division Allocation				Counterterrorism Division Allocation			
Field Office	Criminal Total	Drugs	White-Collar Crime	Violent Crime	CT Total	Counter-terrorism	NIPCIP	Net Change
Albany	(4)	(4)	0	0	4	4	0	0
Albuquerque	(7)	(7)	0	0	6	6	0	(1)
Anchorage	(3)	(2)	(1)	0	5	3	2	2
Atlanta	(8)	(4)	(1)	(3)	11	8	3	3
Baltimore	(11)	(7)	(2)	(2)	7	6	1	(4)
Birmingham	(1)	(1)	0	0	1	0	1	0
Boston	(8)	(6)	(1)	(1)	7	7	0	(1)
Buffalo	(3)	(2)	0	(1)	7	6	1	4
Charlotte	(7)	(5)	(1)	(1)	6	5	1	(1)
Chicago	(17)	(10)	(3)	(4)	10	10	0	(7)
Cincinnati	(3)	(3)	0	0	3	2	1	0
Cleveland	(2)	(1)	(1)	0	2	2	0	0
Columbia	(5)	(4)	(1)	0	5	4	1	0
Dallas	(19)	(13)	(4)	(2)	11	11	0	(8)
Denver	(10)	(5)	(3)	(2)	12	12	0	2
Detroit	(15)	(10)	(2)	(3)	23	23	0	8
El Paso	(11)	(11)	0	0	6	4	2	(5)
Honolulu	(4)	(3)	(1)	0	6	6	0	2
Houston	(1)	(1)	0	0	0	0	0	(1)
Indianapolis	(4)	(2)	(1)	(1)	5	5	0	1
Jackson	(5)	(4)	(1)	0	3	3	0	(2)
Jacksonville	(5)	(3)	(1)	(1)	8	6	2	3
Kansas City	(6)	(4)	0	(2)	6	5	1	0
Knoxville	(5)	(4)	(1)	0	2	2	0	(3)
Las Vegas	(3)	(2)	(1)	0	0	0	0	(3)
Little Rock	(3)	(2)	(1)	0	3	3	0	0
Los Angeles	(41)	(33)	(4)	(4)	23	23	0	(18)
Louisville	(5)	(3)	(1)	(1)	3	3	0	(2)
Memphis	(6)	(5)	(1)	0	3	3	0	(3)
Miami	(35)	(30)	(2)	(3)	48	46	2	13
Milwaukee	0	0	0	0	0	0	0	0
Minneapolis	(7)	(4)	(2)	(1)	6	4	2	(1)
Mobile	(3)	(3)	0	0	3	3	0	0
Newark	(15)	(10)	(1)	(4)	16	12	4	1
New Haven	(2)	0	(1)	(1)	2	2	0	0
New Orleans	(11)	(9)	(2)	0	6	5	1	(5)
New York City	(27)	(22)	(2)	(3)	40	30	10	13
Norfolk	(1)	(1)	0	0	2	1	1	1
Oklahoma City	(4)	(2)	(1)	(1)	5	4	1	1
Omaha	(5)	(4)	(1)	0	8	8	0	3
Philadelphia	(6)	(4)	(1)	(1)	6	6	0	0
Phoenix	(11)	(8)	(2)	(1)	11	11	0	0
Pittsburgh	(8)	(6)	(1)	(1)	3	3	0	(5)
Portland	(6)	(5)	(1)	0	4	4	0	(2)
Richmond	(5)	(5)	0	0	4	3	1	(1)
Sacramento	(13)	(9)	(1)	(3)	25	23	2	12
St. Louis	(5)	(3)	(1)	(1)	4	4	0	(1)
Salt Lake City	(6)	(5)	(1)	0	6	5	1	0
San Antonio	(10)	(10)	0	0	10	9	1	0
San Diego	(12)	(10)	(1)	(1)	8	8	0	(4)
San Francisco	(21)	(18)	(1)	(2)	20	20	0	(1)
San Juan	(3)	(3)	0	0	4	4	0	1
Seattle	(6)	(5)	(1)	0	6	4	2	0
Springfield	(3)	(2)	(1)	0	3	2	1	0
Tampa	(12)	(10)	(2)	0	8	8	0	(4)
Washington DC	(21)	(13)	0	(8)	34	30	4	13
Totals	(480)	(362)	(59)	(59)	480	431	49	0

SUBMISSIONS FOR THE RECORD

Department of Justice

STATEMENT

OF

JOHN ASHCROFT
ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

OVERSIGHT OF THE DEPARTMENT OF JUSTICE

PRESENTED ON

JULY 25, 2002

Remarks of Attorney General John Ashcroft
Senate Judiciary Committee
July 25, 2002

Good morning. Chairman Leahy, Senator Hatch, members of the Judiciary Committee -- thank you for this opportunity to testify today.

Ten months ago, our nation came under attack. In a calculated, deliberate manner, terrorists slammed planes into the World Trade Center, the Pentagon, and a field in Pennsylvania, killing thousands. These attacks were acts of war against our nation, and an assault on the values for which we stand – the values of equality, justice, and freedom. This unprecedented assault brought us face to face with a new enemy, and demanded that we think anew and act anew in order to protect our citizens and our values.

Immediately following the attacks, I ordered a top-to-bottom review and reorganization of the Department of Justice. Our objective was to mobilize the resources of our law enforcement and justice system to meet a single, overarching goal: to prevent future terrorist attacks on the United States and its citizens.

The review found that America's ability to detect and prevent terrorism has been undermined significantly by restrictions that limit the intelligence and law enforcement communities' access to, and sharing of, our most valuable resource in this new war on terrorism. That resource is information.

Many of these restrictions on information were imposed decades ago, in order to address the real and perceived abuses of

law enforcement and intelligence of the 1960s and early 1970s. In the second half of the 1970s, the pendulum of reform swung beyond correcting abuses into imposing what we now recognize as excessive constraints on our intelligence gathering and sharing capabilities.

In the late 1970s, reforms were made reflecting a cultural myth that we could draw an artificial line at the border to differentiate between the threats we faced. In accordance with this myth, officials charged with detecting and deterring those seeking to harm Americans were divided into separate and isolated camps. Barriers between agencies broke down cooperation. Compartmentalization hampered coordination. Surveillance technology was allowed to atrophy, eroding our ability to adapt to new threats. Information, once the best friend of law enforcement, became the enemy.

- Intelligence gathering was artificially segregated from law enforcement, effectively barring intelligence and law enforcement communities from integrating their resources. Under the Foreign Intelligence Surveillance Act, known as FISA, a criminal investigator examining a terrorist attack could not coordinate with an intelligence officer investigating the same suspected terrorists. As compartmentalization grew, coordination suffered.

- Reforms erected impenetrable walls between different government agencies, prohibiting them from cooperating in the nation's defense. The FBI and the CIA were restricted from sharing valuable information. And as limitations on information sharing tightened, cooperation decayed.

- FBI agents were forced to blind themselves to information readily available to the general public, including those who seek to harm us. Agents were barred from researching public information or visiting public places unless they were investigating a specific crime. And as access to information was denied, accountability deteriorated.

- As information restrictions increased, intelligence capabilities atrophied. Intelligence-gathering techniques created in an era of rotary phones failed to keep pace with terrorists utilizing multiple cell phones and the internet. As technology outpaced law enforcement, adaptability was lost.

The culture of rigid information compartmentalization that took root in the 1970s continued, irrespective of changes in Administrations, throughout the 1980s and 1990s. As late as 1995, we found that the guidelines governing FISA procedures were tightened to a degree that effectively prohibited coordination between intelligence officers and prosecutors within the Department of Justice.

Based on this review, we concluded that our law enforcement and justice institutions – and the culture that supports them – must improve if we are to protect innocent Americans and prevail in the war against terrorism. In the wake of September 11, America's defense requires a new culture focused on the prevention of terrorist attacks. We must create a new system, capable of adaptation, secured by accountability, nurtured by cooperation, built on coordination, and rooted in our Constitutional liberties.

Congress has already taken the first, crucial steps to adapt to our changing security requirements.

The passage of the USA-PATRIOT Act made significant strides toward fostering information sharing and updating our badly outmoded information-gathering tools. The Patriot Act gave law enforcement agencies greater freedom to share information and to coordinate our campaign against terrorism. Prosecutors can now share with intelligence agents information about terrorists gathered through grand jury proceedings and criminal wiretaps. The intelligence community now has greater flexibility to coordinate their anti-terrorism efforts with our law enforcement agencies.

The Patriot Act also modernized our surveillance tools to keep pace with technological change. We now have authority under FISA to track terrorists who routinely change locations and make use of multiple cell phones. Thanks to the new law, it is now clear that surveillance tools that were created for hard line telephones – pen registers, for instance – apply to cell phones and the internet as well.

The recently announced reorganization of the Federal Bureau of Investigation is a second way we have risen to meet the new challenges we face. Our reorganization comes in the midst of the largest criminal investigation in United States history, and the expansion of FBI-led Joint Terrorism Task Forces to each of the 56 FBI field offices. Our reorganization refocuses the FBI on a terrorism prevention mission that is different from the past. Instead of being reactive, agents will now be proactive. Instead of being bound by rigid organizational charts, our work force will become flexible enough to launch new terrorism investigations to counter threats as they emerge.

Management and operational cultures will be changed to enhance this adaptability. Over 500 field agents will be shifted permanently to counter-terrorism. Subject matter experts and historical case knowledge will be centralized so they are accessible to field offices, the intelligence community, and our state and local law enforcement partners.

The counter-terrorism division at FBI headquarters will be restructured and expanded significantly to support field offices and other intelligence and law enforcement organizations. And finally, we will enhance the FBI's analytical capacity and integrate our activities more closely with the CIA.

A third way in which we have acted to enhance our homeland security is by giving updated guidance to our FBI agents in the field. After a meticulous review of the previous Attorney General's guidelines, which unnecessarily inhibited agents from taking advantage of new information technologies and public information sources, revised guidelines were announced in May. These new directions to FBI agents are crafted carefully to correct the deficiencies of the old guidelines, while protecting the privacy and civil liberties of all Americans.

Throughout this reform process, the Department of Justice has been guided by four values – the four principles that shape and inform our new anti-terrorism mission: Adaptability. Accountability. Cooperation. Coordination. By following these lodestars, we have worked with Congress and our partners in law enforcement to correct the excesses of the past and to achieve a more stable, secure equilibrium in our justice policy. The creation of the Department of

Homeland Security will prove critical to this process of restoring balance to our security policy.

- President Bush has mandated that the new Department of Homeland Security be an "agile organization" capable of meeting "a new and constantly evolving threat."

- We have sought to achieve greater accountability for our obligation to protect the rights of all Americans. The proposed Department of Homeland Security would ensure that homeland security activities and responsibilities are focused in a single department. For the first time, America will have under one roof the capability to identify and assess threats to our homeland, match these threats to our vulnerabilities, and act to ensure the safety and security of the American people. All Americans will know where the buck stops and with whom.

- We have sought to foster greater cooperation among all aspects of intelligence and law enforcement, be they federal, state or local. The proposed Department would exemplify a new ethic of information sharing in government. FBI Director Mueller put it best. The FBI, he told a congressional panel earlier this month, would provide Homeland Security the access, the participation, and the intelligence necessary for this proposed department to achieve its mission of protecting the American people.

President Bush has called on Congress and the American people to re-examine past practices and to reorganize our government in order to confront the challenge that history has placed before us. His call echoes that of another President, over a hundred years ago, who appealed to Congress and the nation to rise to the daunting task that lay before it.

"The dogmas of the quiet past are inadequate to the stormy present," Abraham Lincoln told Congress in 1862, just before issuing the Emancipation Proclamation. "The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew and act anew."

Securing our homeland is the responsibility with which history has charged us; it is the mission which calls us to think anew and act anew for our nation's defense. I thank you for this opportunity to testify today, and I look forward to working with you to rise to this responsibility.

Thank you very much.

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U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

July 31, 2002

The Honorable Bob Graham
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable Richard C. Shelby
Vice-Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Mr. Vice Chairman:

The letter presents the views of the Justice Department on S. 2586, a bill "[t]o exclude United States persons from the definition of 'foreign power' under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism." The bill would extend the coverage of the Foreign Intelligence Surveillance Act ("FISA") to individuals who engage in international terrorism or activities in preparation therefor without a showing of membership in or affiliation with an international terrorist group. The bill would limit this type of coverage to non-United States persons. The Department of Justice supports S. 2586.

We note that the proposed title of the bill is potentially misleading. The current title is "To exclude United States persons from the definition of 'foreign power' under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism." A better title, in keeping with the function of the bill, would be something along the following lines: "To expand the Foreign Intelligence Surveillance Act of 1978 ('FISA') to reach individuals other than United States persons who engage in international terrorism without affiliation with an international terrorist group."

Additionally, we understand that a question has arisen as to whether S. 2586 would satisfy constitutional requirements. We believe that it would.

FISA allows a specially designated court to issue an order approving an electronic surveillance or physical search, where a significant purpose of the surveillance or search is "to obtain foreign intelligence information." *Id.* §§ 1804(a)(7)(B), 1805(a). Given this purpose, the court makes a determination about probable cause that differs in some respects from the determination ordinarily underlying a search warrant. The court need not find that there is probable cause to believe that the surveillance or search, in fact, will lead to foreign intelligence information, let alone evidence of a crime, and in many instances need not find probable cause to believe that the target has committed a criminal act. The court instead determines, in the case of electronic surveillance, whether there is probable cause to believe that "the target of the electronic surveillance is a foreign power or an agent of a foreign power," *id.* § 1805(a)(3)(A), and that each of the places at which the surveillance is directed "is being used, or about to be used, by a foreign power or an agent of a foreign power," *id.* § 1805(a)(3)(B). The court makes parallel determinations in the case of a physical search. *Id.* § 1824(a)(3)(A), (B).

The terms "foreign power" and "agent of a foreign power" are defined at some length, *id.* § 1801(a), (b), and specific parts of the definitions are especially applicable to surveillances or searches aimed at collecting intelligence about terrorism. As currently defined, "foreign power" includes "a *group* engaged in international terrorism or activities in preparation therefor," *id.* § 1801(a)(4) (emphasis added), and an "agent of a foreign power" includes any person who "knowingly engages in sabotage or international terrorism or activities that are in preparation therefor, for or on behalf of a foreign power," *id.* § 1801(b)(2)(C). "International terrorism" is defined to mean activities that

> (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
>
> (2) appear to be intended--
>
> (A) to intimidate or coerce a civilian population;
>
> (B) to influence the policy of a government by intimidation or coercion; or
>
> (C) to affect the conduct of a government by assassination or kidnapping; and
>
> (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

Id. § 1801(c).

S. 2586 would expand the definition of "foreign power" to reach persons who are involved in activities defined as "international terrorism," even if these persons cannot be shown to be agents of a "group" engaged in international terrorism. To achieve this expansion, the bill would add the following italicized words to the current definition of "foreign power": "*any person other than a United States person who is, or* a group *that is,* engaged in international terrorism or activities in preparation therefor."

The courts repeatedly have upheld the constitutionality, under the Fourth Amendment, of the FISA provisions that permit issuance of an order based on probable cause to believe that the target of a surveillance or search is a foreign power or agent of a foreign power. The question posed by S. 2586 would be whether the reasoning of those cases precludes expansion of the term "foreign power" to include individual international terrorists who are unconnected to a terrorist group.

The Second Circuit's decision in *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984), sets out the fullest explanation of the "governmental concerns" that had led to the enactment of the procedures in FISA. To identify these concerns, the court first quoted from the Supreme Court's decision in *United States v. United States District Court*, 407 U.S. 297, 308 (1972) ("*Keith*"), which addressed "domestic national security surveillance" rather than surveillance of foreign powers and their agents, but which specified the particular difficulties in gathering "security intelligence" that might justify departures from the usual standards for warrants: "[Such intelligence gathering] is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III [dealing with electronic surveillance in ordinary criminal cases]. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the government's preparedness for some possible future crisis or emergency. Thus the focus of domestic surveillance may be less precise than that directed against more conventional types of crime." *Duggan*, 743 F.2d at 72 (*quoting Keith*, 407 U.S. at 322). The Second Circuit then quoted a portion of the Senate Committee Report on FISA: "[The] reasonableness [of FISA procedures] depends, in part, upon an assessment of the difficulties of investigating activities planned, directed, and supported from abroad by foreign intelligence services and foreign-based terrorist groups. . . . Other factors include the international responsibilities of the United States, the duties of the Federal Government to the States in matters involving foreign terrorism, and the need to maintain the secrecy of lawful counterintelligence sources and methods." *Id.* at 73 (*quoting* S. Rep. No. 95-701, at 14-15, *reprinted in* 1978 U.S.C.C.A.N. 3973, 3983) ("Senate Report"). The court concluded:

> Against this background, [FISA] requires that the FISA Judge find probable cause to believe that the target is a foreign power or an agent of a foreign power, and that the place at which the surveillance is to be directed is being used or is about to be used by a foreign power or an agent of a foreign power; and it requires him to find that the application meets the requirements of [FISA]. These requirements make it reasonable to dispense with a requirement that the FISA Judge find

> probable cause to believe that surveillance will in fact lead to the gathering of foreign intelligence information.

Id. at 73. The court added that, *a fortiori*, it "reject[ed] defendants' argument that a FISA order may not be issued consistent with the requirements of the Fourth Amendment unless there is a showing of probable cause to believe the target *has committed a crime*." *Id.* at n.5. *See also, e.g., United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787, 790-91 (9th Cir. 1987) (per then-Circuit Judge Kennedy); *United States v. Nicholson*, 955 F. Supp. 588, 590-91 (E.D. Va. 1997).

We can conceive of a possible argument for distinguishing, under the Fourth Amendment, the proposed definition of "foreign power" from the definition approved by the courts as the basis for a determination of probable cause under FISA as now written. According to this argument, because the proposed definition would require no tie to a terrorist group, it would improperly allow the use of FISA where an ordinary probable cause determination would be feasible and appropriate – where a court could look at the activities of a single individual without having to assess "the interrelation of various sources and types of information," *see Keith*, 407 U.S. at 322, or relationships with foreign-based groups, *see Duggan*, 743 F.2d at 73; where there need be no inexactitude in the target or focus of the surveillance, *see Keith*, 407 U.S. at 322; and where the international activities of the United States are less likely to be implicated, *see Duggan*, 743 F.2d at 73. However, we believe that this argument would not be well-founded.

The expanded definition still would be limited to collecting foreign intelligence for the "international responsibilities of the United States, [and] the duties of the Federal Government to the States in matters involving foreign terrorism." *Id.* at 73 (*quoting* Senate Report at 14). The individuals covered by S. 2586 would not be United States persons, and the "international terrorism" in which they would be involved would continue to "occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum." 50 U.S.C. § 1801(c)(3). These circumstances would implicate the "difficulties of investigating activities planned, directed, and supported from abroad," just as current law implicates such difficulties in the case of foreign intelligence services and foreign-based terrorist groups. *Duggan*, 743 F.2d at 73 (*quoting* Senate Report at 14). To overcome those difficulties, a foreign intelligence investigation "often [will be] long range and involve[] the interrelation of various sources and types of information." *Id.* at 72 (*quoting Keith*, 407 U.S. at 322). This information frequently will require special handling, as under the procedures of the FISA court, because of "the need to maintain the secrecy of lawful counterintelligence sources and methods." *Id.* at 73 (*quoting Keith*, 407 U.S. at 322). Furthermore, because in foreign intelligence investigations under the expanded definition "[o]ften . . . the emphasis . . . [will be] on the prevention of unlawful activity or the enhancement of the government's preparedness for some possible future crisis or emergency," the "focus of . . . surveillance may be less precise than that directed against more conventional types of crime." *Id.* at 73 (*quoting Keith*, 407 U.S. at 322). Therefore, the same interests and considerations that support the constitutionality of FISA as it now stands would provide the constitutional justification for the S. 2586.

Indeed, S. 2586 would add only a modest increment to the existing coverage of the statute. As the House Committee Report on FISA suggested, a "group" of terrorists covered by current law might be as small as two or three persons. H.R. Rep. No. 95-1283, at pt. 1, 74 and n.38 (1978). The interests that the courts have found to justify the procedures of FISA are not likely to differ appreciably as between a case involving such a group of two or three persons and a case involving a single terrorist.

The events of the past few months point to one other consideration on which courts have not relied previously in upholding FISA procedures – the extraordinary level of harm that an international terrorist can do to our Nation. The touchstone for the constitutionality of searches under the Fourth Amendment is whether they are "reasonable." As the Supreme Court has discussed in the context of "special needs cases," whether a search is reasonable depends on whether the government's interests outweigh any intrusion into individual privacy interests. In light of the efforts of international terrorists to obtain weapons of mass destruction, it does not seem debatable that we could suffer terrible injury at the hands of a terrorist whose ties to an identified "group" remained obscure. Even in the criminal context, the Court has recognized the need for flexibility in cases of terrorism. *See Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) ("the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack"). Congress could legitimately judge that even a single international terrorist, who intends "to intimidate or coerce a civilian population" or "to influence the policy of a government by intimidation or coercion" or "to affect the conduct of a government by assassination or kidnapping," 50 U.S.C. § 1801(c)(2), acts with the power of a full terrorist group or foreign nation and should be treated as a "foreign power" subject to the procedures of FISA rather than those applicable to warrants in criminal cases.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

for Patrick M. O'Brien, DAAG

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Charles E. Schumer
The Honorable Jon L. Kyl

Statement of Senator Charles E. Grassley
Senate Judiciary Committee
Hearing on Department of Justice Oversight

July 25, 2002

Mr. Chairman, thank you for holding this hearing today on this Committee's oversight responsibilities regarding the Department of Justice. I want to reaffirm my commitment to ensuring that the Department is operating as efficiently and effectively as possible. I am aware of the challenges that the Attorney General is facing in today's world and I commend Mr. Ashcroft for his leadership and hard work.

Considering the dynamic environment we are working in since September 11th, I also want to reaffirm my commitment to some long standing issues that must not "get lost in the shuffle". We are debating the creation of a new cabinet-level Department of Homeland Security. The established agencies' desires for self-preservation and the long-standing interagency turf battles we hear so much about must be overcome. Our national security is at stake. I am also concerned with intelligence information sharing and identifying areas of duplication and waste in government bureaucracies. In addition, Whistleblower protections for federal employees, regardless of where they work, are essential.

The creation of a new Department to oversee homeland security is a tremendous undertaking for the White House and Congress and we face multiple challenges. Regardless of these difficulties, we have no choice but to strengthen our national security, and I appreciate the President's commitment to doing so. If a new Department of Homeland Security is the answer, I'll do everything I can to enhance its effectiveness. But we must work together. I ask the Attorney General to help ensure that the transition is as smooth and as seamless as possible.

The new Department will have to improve and coordinate our intelligence analysis and sharing functions, as well as our law enforcement efforts. The recent news reports about what information the FBI and CIA had, but did not share or did not pursue, are quite troubling. Our Nation needs to do everything possible to make sure this type of attack never happens again on American soil.

The proposed new Department will combine such entities as part of the National Infrastructure Protection Center (NIPC) from the FBI, the Critical Infrastructure Assurance Office (CIAO) from the Commerce Department, and the Federal Computer Incident Response Center from the General Services Administration, among others. We must ensure a smooth and complete transition of organizational effectiveness, as we cannot afford to have the new Department of Homeland Security reinventing the wheel at this critical point. We cannot allow agencies that are turning over parts of their former domains to be parochial in their approach to this new department.

I want the Attorney General to do all in his power to guarantee that more than just the transfer of authority of the NIPC, but also the institutional knowledge, expertise and effectiveness of that important office takes place. Allowing the FBI to merely hand over open cases and some hardware is not sufficient.

Regardless of what happens to the Immigration and Naturalization Service, for example, the root causes of the ineffectiveness of the INS will not be rectified by merely moving it underneath the umbrella of Homeland Security. Those problems are going to have to be fixed. Moving the blocks around is not going to make for an effective Department. The Attorney General's input on this issue cannot be overlooked.

The smart compilation, and sharing and analysis of intelligence data is critical to our nation in this war against terrorism. However, interagency fighting and turf battles can hinder the war on terrorism. Sharing this information is important, and what action is taken on the information once it is received is crucial. The FBI will have to share intelligence information with the new Department on a daily basis. There's no place for jurisdictional battles and unnecessary statutory barriers with respect to information sharing amongst our intelligence and law enforcement agencies when America's security is at risk. I hope the Attorney General will take all actions necessary to make sure that the FBI's requirement to share information is completely fulfilled.

It is also important that the Justice Department follow the principles of good government and fiscal responsibility. The creation of a new Department of Homeland Security cannot be an excuse to expand the size of the federal government. In fact, we need to see significant streamlining of bureaucracies if this reorganization is going to work. Agencies giving up portions of their former domains cannot be allowed to

recreate new redundant offices in their place. I want the Attorney General to closely monitor the activities of his subordinates in this regard.

Lastly, Whistleblowers are the key to exposing a dysfunctional bureaucracy. FBI Agent Coleen Rowley is just the most recent in a series of whistleblowers who have revealed bureaucratic inefficiencies and misdeeds in a federal agency. Bureaucracies have an instinct to cover up their mistakes, and that temptation is even greater when they can use a potential security issue as an excuse. I am fearful that the Office of Special Counsel will come up with the same interpretation that it has previously regarding the TSA Bill, since the President's proposal contains language very similar. I want the Attorney General to work with me on crafting sufficient protections for all federal employees.

The ultimate goal here before us is to help our intelligence and law enforcement communities at being the best they can be at protecting our nation and the American people. I thank you, Attorney General Ashcroft, for your time and attendance here today.

NEWS RELEASE

ORRIN HATCH

United States Senator for Utah

July 25, 2002 Margarita Tapia, 202/224-5225

Statement of Senator Orrin G. Hatch
Ranking Republican Member
Before the Senate Committee on the Judiciary
Hearing on

"Oversight of the Department of Justice"

I am pleased to welcome our good friend and former colleague, Attorney General Ashcroft, back to the Committee. It need not be said that these are challenging times for the country. Now, more than ever, we can fully appreciate the tireless and often heroic efforts of our federal law enforcement officials, generally, and your efforts, General Ashcroft, specifically.

General Ashcroft, you can be sure that the American public appreciates your leadership at the Department of Justice during these trying and anxious times. I want to personally commend you, the Department of Justice, and the entire Administration for your dedication and commitment to ensuring the safety of our citizens. We have to look no further than the daily press reports to appreciate the degree to which your efforts are protecting us from terrorist threats. Hardly a day goes by that we do not hear of yet another deadly terrorist attack in the Middle East. We appreciate that you are taking every lawful measure in your power to protect our citizens from such attacks.

While we applaud you and take great solace in the fact that there have been no new attacks in the ten months since September 11, we all recognize that we can and must do more to prevent future attacks on our country.

The Administration and Congress welcomed this challenge immediately following the September 11 attacks. Once the shock, outrage, and numbness wore off, we realized we were living in an entirely new world where many aspects of our everyday lives had been changed forever. The Administration showed leadership by sending proposed anti-terrorism legislation to Congress. Congress responded by putting aside partisan differences and passing the PATRIOT Act, with a near unanimous vote in the Senate. This Act provided the Justice Department with much needed tools to combat terrorism. It was a measured response that balanced the need to protect Americans with the need to protect Americans' civil liberties. And despite the dire predictions of some extremist groups, the PATRIOT Act has created no erosion of the civil

liberties that we hold dear as Americans.

Today, I believe many of us would like to hear about the coordination of the Department of Justice with the recently proposed Department of Homeland Security. After carefully considering the input of Congress, academics, and other experts, the President proposed comprehensive legislation to create the new Department. There is little question that this proposal, which will merge components of dozens of government agencies and departments, is an ambitious one, but one that makes sense and will create efficiencies. Government entities that are charged with protecting our country's borders and infrastructure, assessing threats, and responding to national emergencies all must work collaboratively, effectively and efficiently to prevail in this War on Terrorism.

General Ashcroft, the Committee is well-aware of how essential it is to foster the effective sharing of information both within and among government agencies. Indeed, many of us believe the ability to enhance information sharing within government is the most critical challenge we face, and was the focus of some of the most important changes we made when we passed the PATRIOT Act. We welcome your comments on this subject.

We are also interested in hearing about the various reforms you have instituted in the Department of Justice to improve its ability to fight terrorism. FBI Director Mueller has told us about the Bureau's reorganization proposal, which addresses the information sharing problems that were highlighted by the September 11 attacks. Director Mueller also related how he has redirected the FBI's mission by focusing its resources to detect deadly terrorist attacks before they happen.

I will say again, as I said to Director Mueller, that it is a pleasure to see – for the first time in a decade – a close and cooperative working relationship between the Attorney General and the Director of the FBI. It stands as a testament to your leadership at the Department of Justice. Without full cooperation and effective communication, our country's ability to respond to the challenges posed by terrorist threats would be severely hindered.

Since September 11, we have also been made aware of reforms you have instituted within the Justice Department. You have created a large number of Anti-Terrorism Task Forces across the country which are working to integrate the communications and activities of local, state and federal law enforcement officers. You have also created the Foreign Terrorist Tracking Task Force in order to assist the FBI, the INS, Customs Service and other federal agencies in coordinating their efforts to bar aliens who are suspected of being involved in terrorist activities.

More recently, you announced amended guidelines that will assist the FBI in conducting investigations capable of preventing terrorist attacks. In my view, these guideline changes support, and in fact are critical to, the FBI's reorganization plan. While there appears to be bipartisan support for the revised guidelines, concerns have been voiced about their scope. It seems clear to me, however, that if we are serious about ensuring that the FBI can operate

proactively, and investigate future, rather than merely past crimes, the FBI must have the ability to do things our Constitution permits, like search the Internet, use commercial data mining services, and visit public places.

You have also taken concrete steps to protect our borders. In June, you strengthened our nation's entry-exit registration system by extending the registration requirements for individuals who potentially pose a risk to our national security. This initiative will enhance the Department's ability to track the movements of such individuals in and out of our country.

Just last week, you invoked authorities granted by the PATRIOT Act to secure our borders by requesting the Secretary of State to designate nine additional groups as *terrorist organizations*. In December of last year, the Secretary designated, at your request, 39 such groups. Groups like al Qaeda, HAMAS, and Hezbollah, which enter our country to network and raise funds to finance terrorist attacks against innocent civilians here and abroad must be kept out of the United States.

Finally, most recently, the Administration announced Operation TIPS, a pilot program that will encourage private citizens to report to homeland security agencies suspicious activities that they observe in the ordinary course of business. The program will enlist the resources of our ordinary citizens to report suspicious activity that is seen in public view. Our law enforcement officers cannot be at all places at all times, and I am interested to hear your views on that.

You have, in short, been a very busy man. And let me tell you right now how much I appreciate your dedication and hard work to the nearly endless task that awaits you.

As we, in our oversight capacity, scrutinize the inner workings of the Department of Justice to assess its performance in the War on Terrorism, we tend to focus on the Department's shortcomings, without fully crediting its successes. We are unaware of the countless uncovered schemes and diverted plots that never come to light. But occasionally, such victories are public for all to see.

Just last week, the Justice Department scored a major triumph in the John Walker Lindh case. While most Americans, including me, will never be able to understand what provoked that man to do the things he did, we were relieved to hear that he has been found guilty and faces a severe sentence for his criminal actions.

This week we learned that the Justice Department has succeeded in obtaining an indictment against five leaders of the Abu Sayyaf terrorist group that committed deadly hostage-taking acts against Americans and others in the Philippines.

Zacarias Moussaoui, the alleged 20th hijacker in the September 11 attacks, has been indicted on death penalty charges and awaits trial in the Eastern District of Virginia.

With each of these cases, this Administration, acting through its Department of Justice, and with the assistance of its allies overseas, sends a strong message to all who commit acts of terrorism against Americans: You will be found, you will be prosecuted, and you will be bought to justice.

I believe all of us are grateful to you, Mr. Attorney General, for your zealous but fair treatment of those who have been detained in connection with the September 11 attacks. There are some who would like us to pass legislation, or amend the Constitution, to provide enemy combatants with more rights than they are currently entitled. However, I believe that most reasonable, informed citizens would disagree with this approach. It seems odd to argue that our soldiers could – and should – shoot an enemy combatant in the battlefield, but must give them Miranda warnings and a full-trial with an American defense attorney if they survive the battle. The fact is, when compared to steps Presidents and Congresses have taken in previous wars in the name of security, it is preposterous to argue that the actions taken by our Department of Justice and Department of Defense are anything but measured.

I also want to applaud you for your aggressive response to crimes of corporate fraud. As each corporate scandal has come to light, you and the Securities and Exchange Commission have responded swiftly and effectively. As soon as evidence of corporate wrongdoing surfaced at Enron, the Department of Justice established a special Task Force to investigate the matter. Within weeks, federal prosecutors sought and obtained a grand jury indictment charging Arthur Andersen with obstruction of justice. Just last month, a jury convicted Andersen. Without a doubt, the Department, under your leadership, has delivered a clear message to the corporate world, just as you have to the terrorist world. Abuses will not be tolerated. This Department is not a paper tiger.

I understand that the Justice Department's Enron Task Force continues to pursue vigorously a host of criminal investigations about which you cannot comment. Those who suggest that the Justice Department and the SEC could or should have accomplished more by now have little appreciation of the time, resources and effort it takes to investigate and prosecute a sophisticated white collar case successfully.

And those who question the Justice Department's and SEC's resolve should consider whether some of today's scandals could have been avoided through vigorous enforcement by the previous Administration. At a time when too many Americans are questioning whether laws or ethics remain present in boardrooms, it is reassuring to know that this Justice Department will not allow corporations that have defrauded investors and employees to walk away with a slap on the wrist.

Shortly, we in Congress will deliver to the President's desk legislation which will include additional criminal tools and enhanced penalties that will assist you and the SEC in these investigations and prosecutions. Thanks to the President's recent Executive Order, representatives of the Department of Justice will provide additional resources and a body of

expertise that will offer direction in the investigations and prosecutions of significant financial crimes. It is evident that the Corporate Fraud Task Force is already hard at work. Just yesterday, Deputy Attorney General Thompson, the Task Force's head, announced that three Adelphia cable television executives have been charged with securities, bank and wire fraud. I am interested in hearing more about how you perceive this body will assist the Department and the SEC in combating corporate fraud.

In closing, I would like to extend a special thanks to you, General Ashcroft, for the degree to which you and Director Mueller have been responsive to the inquiries of this Committee and to the Joint Intelligence Committees. This is your third appearance before this Committee since September 11. Director Mueller has appeared here twice and has briefed members of this Committee in separate sessions as requested. And both of you have made senior Justice Department and FBI employees available to address various issues of concern. We sincerely appreciate the responsiveness you both have demonstrated, particularly in this time of war.

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STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE SENATE JUDICIARY COMMITTEE, REGARDING DEPARTMENT OF JUSTICE OVERSIGHT, THURSDAY, JULY 25, 2002, SD-226, 10:00 AM.

Mr. Chairman:

Thank you for holding this important hearing today regarding Department of Justice oversight. I am pleased that this committee is closely examining the policies and initiatives of our Nation's top law enforcement department. We have a duty to the American people to conduct appropriate oversight, regardless of political affiliations, because the proper administration of justice is crucial to the rule of law in our society. I am delighted to welcome the Attorney General here today, and I look forward to his testimony.

At the outset, I would like to congratulate the Attorney General for the fine job that he is doing for our Country. He is faced with an extremely difficult task in the wake of the terrorist attacks of September 11. As he indicated in his previous testimony before this committee, he is briefed daily on threats made against American interests. Despite these extraordinary circumstances, the Attorney General has performed admirably, carefully crafting the department's policies so that they protect the American people and are in accordance with the Constitution.

The Administration, and particularly the Attorney General, have been criticized on many fronts for actions taken during the war on terrorism. I would like to address some of the specific concerns. First of all, it has been reported that Jose Padilla, the man suspected of plotting a "dirty bomb" attack, is being held as an "enemy combatant." Some civil liberties groups have criticized the classification of his detention in this way. By holding Padilla as an enemy combatant, his detention presumably will not be subject to the day-to-day scrutiny of Federal courts. Rather, the President, as Commander-in-Chief, will have greater latitude to detain and interrogate Padilla.

While I understand the civil liberties concerns that have been raised, I believe that the Administration's actions in this regard are entirely appropriate. The Constitution places significant war powers in the hands of the President by designating him as Commander-in-Chief. The President, as the undisputed leader of military operations, has inherent authority to investigate those combatants who are waging war against Americans. He also has access to privileged national security information. The President is therefore best suited to make decisions about the detention

of individuals with obvious ties to terrorist networks.

It is important to note that the processing of enemy combatants through normal routes in the Federal courts is an issue that implicates national security because mistakes that lead to the release of al-Qaida members could result in the loss of thousands of lives. Therefore, it is appropriate and desirable for the President to handle the detention of enemy combatants with some degree of discretion.

I would like to stress that in no instance will enemy combatants be completely cut off from Federal courts. The writ of habeas corpus is available to anyone detained by the Federal government. This writ is designed to guard against any potential abuses, and there is no reason to believe that habeas review will be inadequate in these circumstances.

I would also like to say a few words about the significant criticism that has been aimed at the recent changes that the Attorney General made to the guidelines governing FBI investigations. I believe that these new guidelines are not only constitutional, but are absolutely essential to the counter-terrorism efforts at the FBI.

The central mission of the FBI is to prevent terrorist

attacks against the United States. If the Bureau is to accomplish this mission, it must take proactive steps. We cannot afford to limit the FBI to reaction alone if terrorist activity is to be detected before it occurs. We must unshackle the hands of law enforcement officers so that they can be truly vigilant in their efforts to protect American lives.

The guideline changes made by the Attorney General are common sense approaches to fighting terrorism. The guidelines allow for FBI agents to access publicly available information to search for leads. In the past, agents were unable to access many of the same types of records that are easily available to private persons. In this age of information technology where research tools are readily available, it defies reason to deny the FBI access to publicly accessible information. For example, the FBI will now be able to conduct online searches regarding general topics "on the same terms and conditions as members of the public generally." As long as this research is adequately supervised, I feel that this is an appropriate and reasonable tool to help the FBI fight terrorism.

Another guideline change would allow the FBI to visit a

public place or event "on the same terms and conditions as members of the public generally." Far from being a radical shift in policy, this guideline would allow FBI agents to walk into any public place with an eye towards preventing terrorism. Some critics have suggested that this new power will enable the government unfettered access to places of worship and other gatherings, thereby chilling First Amendment speech. In my view, this concern is overblown for two reasons. The first is that any private person could access these public areas. Therefore, any expectation of privacy at these gatherings and events is lessened. Second, the guidelines provide protections to prevent abuse. For example, an agent would be prohibited from retaining information gathered during one of these visits unless the information is related to "potential criminal or terrorist activity."

I would also like to stress that these guidelines specify that files cannot be kept on individuals "solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of the United States." By including this language, the Attorney General has made it

clear that abuses of the past will not be repeated. I feel confident that these new rules have been carefully tailored to provide the FBI with new abilities to fight terrorism and at the same time protect the civil liberties of all Americans.

Another important measure taken by the Attorney General is the establishment of an entry-exit registration system for aliens who may pose security threats. This is a positive development, and one that is long overdue. While I am pleased by the Attorney General's efforts in this area, I do not think that his proposal goes far enough. We must keep adequate information on all aliens, especially those non-immigrants who have no plans to become citizens.

Some critics have charged that registration is inappropriate because it unfairly targets aliens. However, we have seen the consequences of failing to monitor alien activity within our borders. There are many who wish to cause us harm, and we must take every precaution to protect law-abiding citizens.

Yet another important issue in the war against terrorism is the development of a new Homeland Security Department. Currently, the Congress and the Administration

are in the process of determining what agencies should be placed within the new department or transferred to existing departments. I have been made aware of attempts to move the Federal Law Enforcement Training Center (FLETC), currently in the Treasury Department, to the Department of Justice. I think that this would be a serious mistake.

FLETC was created in 1970 and is responsible for training Federal law enforcement officers from a variety of agencies in all three branches of government. FLETC students come not only from agencies within DOJ, but also from agencies such as the Federal Aviation Administration, Transportation Security Administration, and the Secret Service. Additionally, the President's homeland security plan would place nine agencies with law enforcement and security functions in the new Department of Homeland Security. All of these agencies participate in FLETC and combined will account for almost 70% of the student workload projected for Fiscal Year 2003. It therefore does not make sense to move FLETC to the Department of Justice. If it is moved anywhere, the agency should be transferred to the Homeland Security Department, which would supply most of the workload for FLETC. I hope that the Attorney General will

keep these concerns in mind as he advises the President regarding the proper placement of FLETC within the Federal government.

I would like to turn to other important areas of DOJ jurisdiction. Despite the Department's commitment of resources to the fight against terrorism, DOJ has not failed to carry out its other duties. The Department has responded to the accounting scandals that have adversely affected our markets and withered confidence in corporate America. Just yesterday, Deputy Attorney General Larry Thompson announced the arrest of several top executives at Adelphia Corporation, charging them with securities fraud and conspiracy. These executives allegedly used corporate funds to enrich themselves at the expense of investors. I commend the Attorney General for his efforts to bring corporate wrongdoers to justice, ensuring our Government's commitment to protecting investors and our economy.

I am also pleased that the President has established a Corporate Fraud Task Force. The task force will include the Deputy Attorney General as well as the Assistant Attorneys General for the Criminal and Tax Divisions. It will be responsible for, among other things, providing guidance to

the Attorney General regarding the investigation and prosecution of securities and accounting fraud. The task force will also work to improve cooperation between departments of the Federal government and between Federal agencies and state governments. This initiative, while still in the early stages, demonstrates that the Administration is committed to halting corporate wrongdoing.

Mr. Chairman, thank you for holding this hearing today. While I do not agree with many of the criticisms aimed at the Administration, I take seriously this committee's oversight responsibilities. We should not shy away from a thorough examination of the Department of Justice. By working together with the President and the Attorney General, as well as others in the Administration, we will move forward in a positive manner and successfully meet the challenges that lie ahead.

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